HUMAN RIGHTS AT WORK

HRPAO
Human Resources
Professionals
Association of Ontario

Ontario
Human Rights
Commission

Commission
ontarienne des
droits de la personne

Ontario

HUMAN RIGHTS AT WORK

Published by the Human Resources Professionals Association of Ontario (HRPAO)

In partnership with the Ontario Human Rights Commission

Province of Ontario, Toronto, Canada

© 2004, Government of Ontario

ISBN 0-7794-5662-9

Available in various formats:
IBM compatible computer disk, audiotape and large print

Also available on the Internet: http://www.ohrc.on.ca

Disponible en français

HRPAO
Human Resources
Professionals
Association of Ontario

Ontario
Human Rights
Commission

Commission
ontarienne des
droits de la personne

Ontario

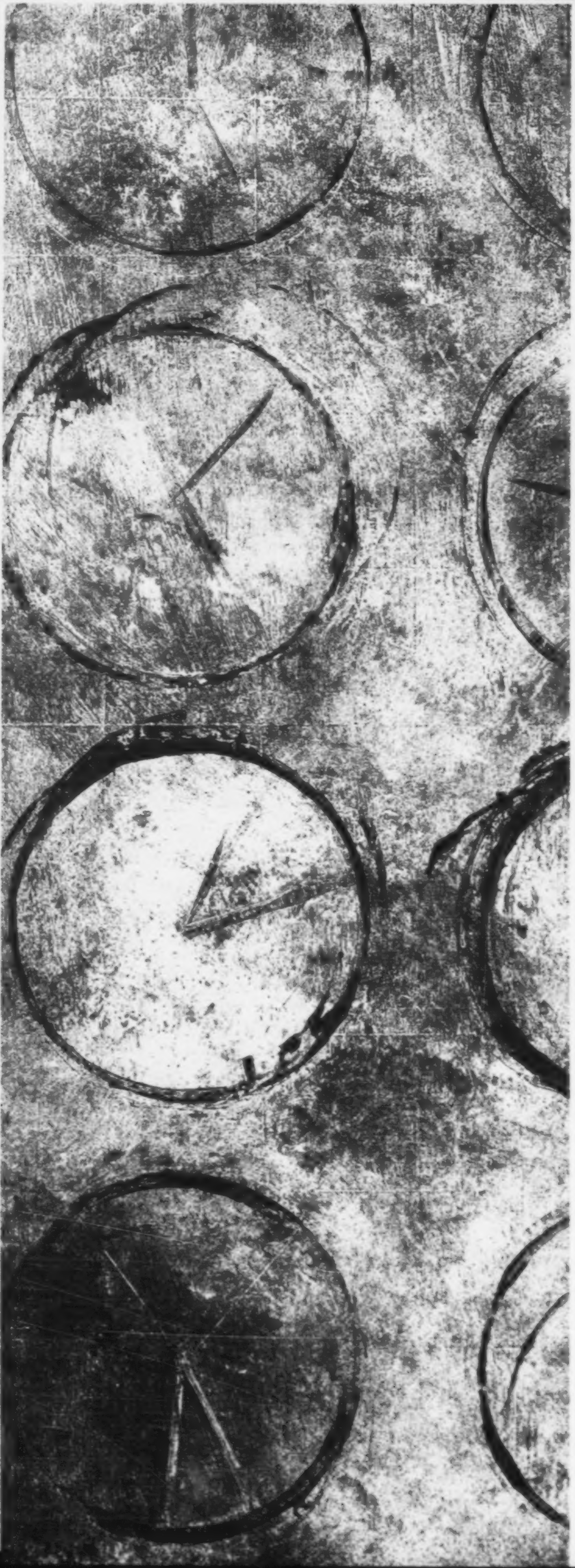


TABLE OF CONTENTS

I. Introduction 1

II. Human Rights in the Workplace: Which Laws? 3

The Ontario *Human Rights Code* 3

The *Canadian Human Rights Act* 4

Employment Standards Act 4

Labour Laws 4

The *Occupational Health and Safety Act* 5

The *Workplace Safety and Insurance Act* 5

Ontarians with Disabilities Act, 2001 5

The *Building Code* 6

Privacy Laws 6

The *Canadian Charter of Rights and Freedoms* 6

International Human Rights 6

III. Principles and Concepts 9

1. The Basic Rule: Section 5 9

2. What are "Discrimination" and "Harassment"? 10
   Discrimination 10
   Harassment 12

3. Grounds of Discrimination: Definitions and Scope of Protection 16
   a) Age 16
   b) Ancestry and Ethnic Origin 17
   c) Citizenship 17
   d) Creed 17
   e) Disability 19
   f) Family Status 20
   g) Marital Status 20
   h) Place of Origin 21
   i) Pregnancy 21
   j) Race and Colour 22
   k) Record of Offences 22
   l) Sex 22
   m) Sexual Orientation and Same-sex Partnership Status 24
   n) Multiple/Combined Grounds of Discrimination 25

104-04651/

4. Legal Responsibility for Human Rights at Work 26
  - a) Employers 26
  - b) Senior Managers 27
  - c) Employees 27
  - d) Non-employees 27
  - e) Unions 27
  - f) Employment Agencies 28
  - g) Franchisors 28

5. Who is Protected at Work? 29
  - a) Employees 29
  - b) Temporary and Casual Staff 29
  - c) Personnel Under Contract 29
  - d) Volunteers and Other Workers 30
  - e) Medical and Personal Attendants 30

6. Making the Workplace Accessible for Persons with Disabilities 31
  - a) Inclusive Design 31
  - b) Accessibility Review 32

IV. Terms and Conditions of Employment 34

1. Designing a Job 34
  - a) Inclusive Design 34
  - b) *Bona Fide* Occupational Requirements 34
  - c) Physical Demands Analysis 36
  - d) Essential Requirements 36
  - e) Special Requirements 36
  - f) Special Programs 38

2. Hiring 40
  - a) Advertising 40
  - b) Employment Agencies/Search Firms 41
  - c) Application Forms 41
  - d) Interviews 43
  - e) Conditional Job Offers 47
  - f) Medical Tests 47
  - g) Psychometric and Psychological Testing 48
  - h) Pre-Employment Drug and Alcohol Testing 49

3. On the Job 51
  - a) Confidentiality 51
  - b) Meeting the Needs of Employees 52
  - c) Drug and Alcohol Testing 62
  - d) Harassment and Personal Safety 64
  - e) Employee Benefits and Human Rights 64
  - f) Advancement, Promotion, Developmental Opportunities 66
  - g) Special Situations 68

V. Human Rights Complaints 71

1. Internal Complaints Procedures in Your Organization 71
  - a) Policies 71
  - b) Complaint Resolution Procedures 73
  - c) Protection against Reprisals 74
  - d) Resolution 75
  - e) Education/Training Programs 75
  - f) Collective Agreements and Complaints 76

2. Complaints to the Ontario Human Rights Commission 77
  - a) Overview of the Process 77
  - b) Remedies 78

VI. Conclusion 80

VII. Other OHRC Publications 82

Policies and Guidelines 82

Plain Language Documents 82

Other Publications 83

VIII. Resources 85

1. Community and Professional Organizations 85

2. Government Organizations 87

3. Workplace Accommodation: Resources on the Internet 89

4. Print Resources 90

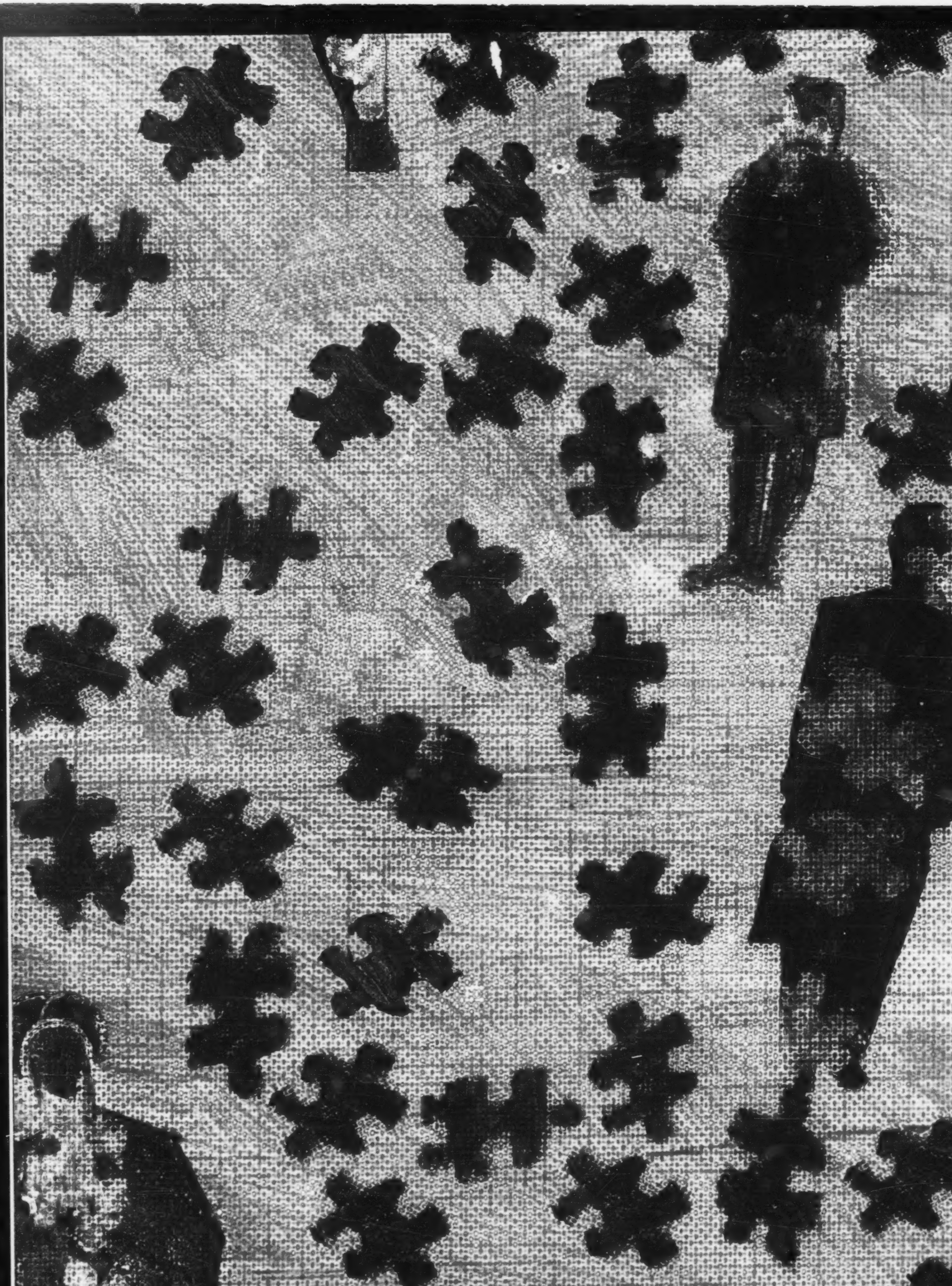
5. Sources for Government Publications 91

The Ontario *Human Rights Code* 93

APPENDIX "A" - SAMPLE APPLICATION FOR EMPLOYMENT 109

ENDNOTES 112

INDEX 118



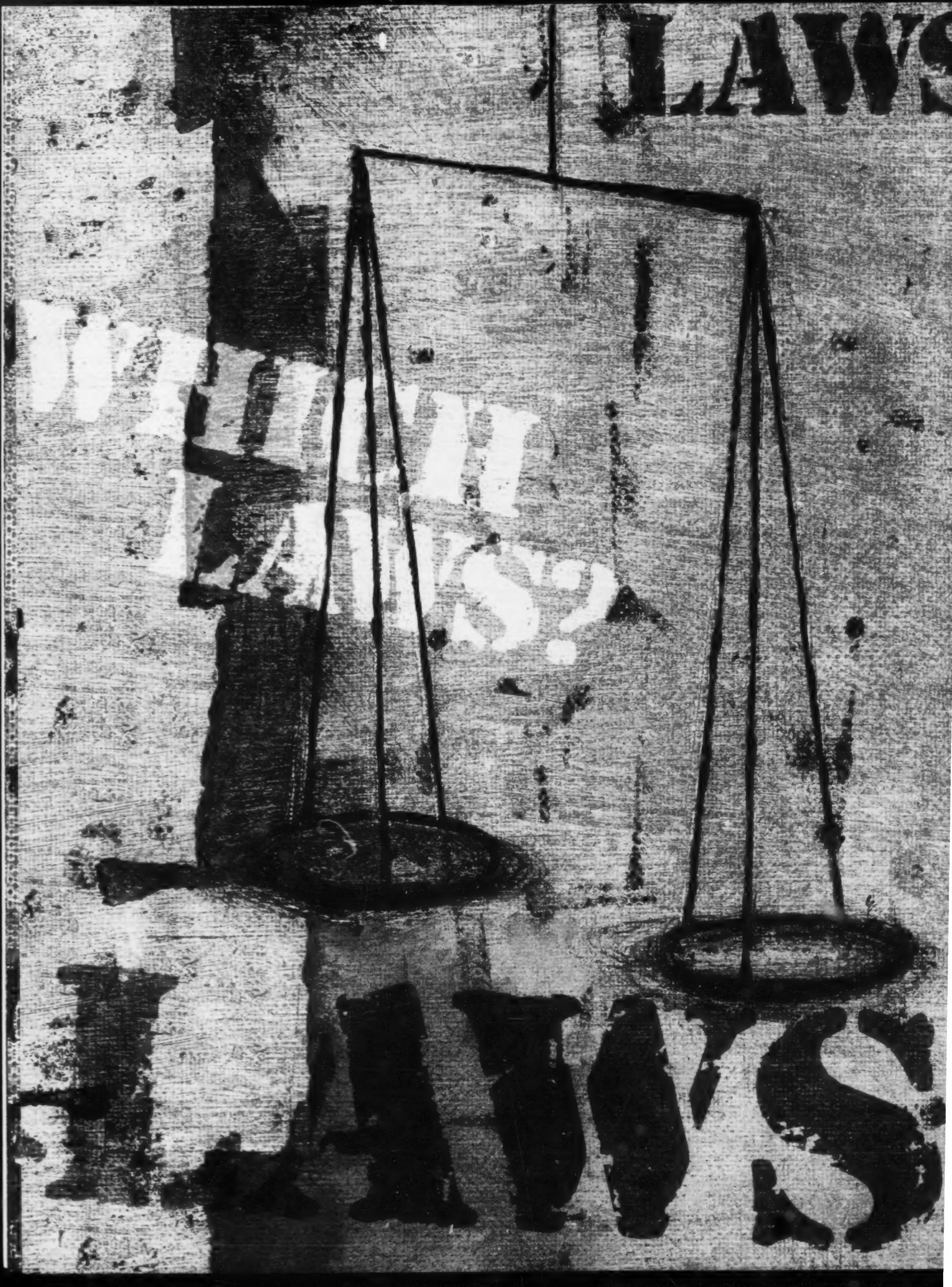
INTRODUCTION

This is the second edition of *Human Rights at Work*. Since it was first launched in 2000, *Human Rights at Work* has been recognized as an essential workplace tool. It helps employers and all partners in the workplace understand and comply with human rights laws, and create a work environment that promotes the values of the Ontario *Human Rights Code*: respect for the dignity and worth of all Ontarians, mutual respect and understanding, and equal opportunity to participate in and contribute to the community.

It is the product of a partnership between the Ontario Human Rights Commission (OHRC) and the Ontario Human Resources Professionals Association of Ontario (HRPAO). The Human Resources Professionals Association of Ontario (HRPAO) is the not-for-profit association focused on innovations, issues and ideas that inspire leading human resource management. With over 13,000 members across the province, HRPAO is the source of knowledge and the voice of experience for any practitioner or business in Ontario that wants to find ways to create the best practices in the working world and draw the best work from people on the job.

Human Rights at Work advocates best practices and principles that create an environment of mutual respect where each person is equal in dignity and rights. Compliance with human rights law is a best business practice. By bringing together the OHRC and the HRPAO on this project, we have developed a guide that provides practical advice and guidance on dealing positively with all types of human rights issues in the workplace. Whether you are an employer, a human resource manager, an employer or employee association, a union or professional, this book will prove invaluable as you apply the *Human Rights Code* to your workplace.

This document is not a policy statement, nor can it replace reference to the authoritative text of the *Code*. A copy of the *Code* is included in this publication for ease of reference. The information in this document is not intended to replace legal advice. If you need help with a human rights matter, you should seek expert advice. If you have questions about the *Code* or the Commission's policies, please contact the Ontario Human Rights Commission at 1-800-387-9080 or in Toronto (416) 326-9511 (Toronto TTY (416) 314-6526 and Ontario TTY 1-800-308-5561). The Commission's Web site (http://www.ohrc.on.ca) provides information on the *Code*, policies, and case summaries. You can also contact Commission staff by e-mail through this site.


LAWS
WHICH LAWS?
LAWS

ii

HUMAN RIGHTS IN THE WORKPLACE: WHICH LAWS?

In employment, several laws may apply at the same time as the *Code*, with overlapping or parallel responsibilities. Knowing which laws apply and why they apply will help employers know how best to handle the relationship between employment law and human rights law.

The Ontario *Human Rights Code*

The *Code* provides for equal rights and opportunities without discrimination. It was one of the first laws of its kind in Canada. Before 1962, various laws dealt with different kinds of discrimination. The *Code* brought them together into one law and added some new protections.

The *Code* is divided into an introductory section, or "preamble", followed by five parts. Part I sets out basic rights. Part II explains how the *Code* is interpreted and applied. Part III explains the role and structure of the Commission and Part IV explains how the *Code* is enforced. Finally, Part V deals with general matters such as the primacy of human rights law.

The Preamble[1] to the *Code* was inspired by the 1948 *Universal Declaration of Human Rights*, an international statement of rights agreed to by many of the world's nations and proclaimed by the United Nations. It is the basis for many of our human rights protections in Canada and around the world. The Preamble sets the tone and spirit for the *Code*'s aim: to create a climate of understanding and mutual respect, so that each person feels part of the community and is able to contribute fully to the development and well-being of the community and the Province. The courts have said that because of the importance of the *Code*, it should be given a broad and generous interpretation.

> *When there is a conflict between the* Code *and another Ontario law, the* Code *prevails unless that law specifically states it applies despite the* Code.[2]

The *Code* covers five social areas:

- Employment
- Services, goods and facilities
- Accommodation (housing)
- Contracts
- Membership in vocational associations and trade unions

Human Rights at Work focuses on the area of employment, although there are related issues pertaining to services, goods and facilities, contracts and membership in vocational associations.

In the area of employment, the following grounds are relevant:

- *race*
- *ancestry*
- *place of origin*
- *colour*
- *ethnic origin*
- *citizenship*
- *creed (religion)*
- *sex (includes pregnancy)*
- *sexual orientation*
- *disability*
- *perceived disability*
- *age*
- *marital status*
- *same-sex partnership status*
- *family status*
- *record of offences*

The Ontario *Code* provides protection against discrimination in Ontario only. The *Canadian Human Rights Act*[3] applies to workplaces that are integral to a federal undertaking or the operation of which falls within federal legislative authority.

The *Canadian Human Rights Act*

The *Canadian Human Rights Act* covers workplaces such as:

- federal departments and agencies;
- Crown corporations;
- the post office;
- chartered banks;
- airlines;
- television and radio stations;
- inter-provincial communications and telephone companies;
- buses and railways which travel between provinces;
- places of business where labour issues are governed by the *Canada Labour Code*;
- other federally-regulated industries, such as certain mining operations.

The Ontario Human Rights Commission has no jurisdiction over federal organizations or those that are engaged in an activity that is regulated by the federal government. If an organization is federal or federally regulated, the *Canadian Human Rights Act* applies, and not the *Code*: these two laws are mutually exclusive. It should be noted that the choice of incorporating statute does not determine whether a company is provincially or federally regulated.

Employment Standards Act

The *Employment Standards Act*[4] is an Ontario law that sets out certain minimum rights to which employees are entitled in the workplace. The rights include minimum wages, overtime, termination and severance pay, pregnancy and parental leave, vacation and public holidays and hours of work.

Both the *Employment Standards Act* and the *Code* may apply at the same time. These two laws are not mutually exclusive. In cases where there is concurrent jurisdiction, the Commission may decide not to deal with a complaint under subsection 34(1)(a) of the *Code*[5] if the matter is better addressed under the *Employment Standards Act*. Alternatively, the Commission may decide that even if a person has filed a complaint under the *Employment Standards Act*, there may nevertheless be outstanding human rights issues that are unresolved. In such cases, there may be proceedings under both laws.

Labour Laws

The Ontario *Labour Relations Act*[6] covers unionized workplaces. Its purpose is to ensure the right to organize, encourage collective bargaining, promote harmonious labour relations and provide for effective and fair dispute resolution.

Arbitrators appointed under this *Act* can interpret and apply the *Code* when resolving grievances, despite any conflict between the *Code* and the terms of the collective agreement. The substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction.[7]

Both the Ontario *Labour Relations Act* and the *Code* may apply to a particular situation. The two laws are not mutually exclusive. The Commission recognizes that there is a public interest in stable and harmonious labour relations through the application of collective agreements. The Commission is mindful that the *Code* is not a tool to replace the collective bargaining process since the *Code* is not intended to provide an avenue of "appeal" from decisions made under other Acts.

The Commission may therefore decide not to deal with a complaint under subsection 34(1)(a) of the *Code*[8] if a labour relations tribunal has already fully canvassed the human rights issues involved in the dispute. Grievances are often more suitable in dealing with workplace disputes. Arbitrators tend to deal with matters more quickly, partly because there is no investigation process comparable to that employed by the Commission. In some cases, the failure to use a grievance procedure may also give rise to a decision by the Commission not to deal with the matter.

However, the mere fact that a dispute arises in an employment context and is subject to a collective agreement does not mean the Commission will automatically refuse to deal with a matter. The broader public interest in the elimination of discrimination may support a decision to deal with a matter notwithstanding an alternative recourse under another Act. For example, certain types of harassment or cases presenting complex issues may require investigation by the Commission. Each case is considered on an individual basis.

The *Canada Labour Code*[9] covers labour relations in federal workplaces in a manner similar to the Ontario *Labour Relations Act*. For example, Canada Post Corporation is covered by the *Canada Labour Code*. The *Canadian Human Rights Act* also applies in situations where the *Canada Labour Code* is the appropriate legislation for labour purposes.

The *Occupational Health and Safety Act*

This legislation outlines requirements and responsibilities in relation to workplace occupational health and safety.

The weight of the case law suggests that complaints of racial or sexual harassment are more appropriately brought to the Commission, rather than through the initiation of proceedings under the *Occupational Health and Safety Act*.[10]

The *Workplace Safety and Insurance Act*

Injuries in employment-related accidents are covered by the *Workplace Safety and Insurance Act*[11] (formerly the *Workers' Compensation Act*). This *Act* provides an insurance plan to protect injured workers and allows employers to limit their financial exposure through a funding system based on payroll assessment.

A person who has claimed or received benefits under the *Workplace Safety and Insurance Act* is deemed to have a disability for the purposes of the *Code* and is entitled to file a human rights complaint resulting from unequal treatment on the ground of disability.[12] Therefore, it is appropriate and indeed likely that complaints or litigation under this *Act* and the *Code* may go on at the same time.

Ontarians with Disabilities Act, 2001

The *Ontarians with Disabilities Act, 2001*[13] (ODA) was passed on December 14, 2001. Several key sections became law on February 7, 2002, including the establishment of the Minister's Accessibility Advisory Council and the Accessibility Directorate. The majority of ODA obligations became law on September 30, 2002 and December 31, 2002.

The purpose of the ODA is to improve opportunities for people with disabilities and to provide for their involvement in the identification, removal and prevention of barriers to their full participation in the life of the province.

The ODA covers the same broad range of disabilities as the *Code*. These include physical, sensory, cognitive, developmental and mental disabilities, and brain injury.

The ODA establishes annual accessibility planning requirements for the following organizations: Ontario government ministries, municipalities, public transportation organizations, hospitals, school boards, colleges and universities. Under the ODA, these organizations are legally required to prepare an annual accessibility plan that addresses the identification, removal and prevention of barriers to people with disabilities. The plans must be developed in consultation with people with disabilities and made available to the public.

The preparation of annual accessibility plans under the ODA complements rather than removes existing obligations under the Ontario *Human Rights Code*. In addition, the *Code* retains primacy over the ODA. This primacy is established under the *Code* and is reinforced in section 3 of the ODA. Organizations with obligations to prepare annual accessibility plans should take into account the *Code* requirements to accommodate persons with disabilities.[14]

The *Building Code*

The Ontario *Building Code* (OBC)[15] governs the construction of new buildings and the renovation and maintenance of existing buildings. The purpose of the OBC is to ensure uniform general standards to achieve its objectives of safety, health and protection of buildings.

The requirements for the objective of accessibility are mostly set out in section 3.8 of the OBC, **Barrier-Free Design**. "Barrier-free" is defined in the OBC as meaning that a building and its facilities can be approached, entered and used by persons with physical or sensory disabilities.[16] The provisions set out standards relating to the installation and construction of doors, elevators, paths of travel, washrooms, *etc.* that provide barrier free wheelchair access. There is also a provision requiring assistive listening devices for public auditoriums, meeting rooms and theatres.

The *Code* has primacy over the OBC. This primacy is established under the *Code* and the *Code* applies to the OBC itself. In other words, the fact that a facility complies with the OBC does not protect it from a challenge under the *Code*.[17]

Persons involved in the design, construction or renovation of buildings should take into account the *Code* requirements to accommodate persons with disabilities.[18]

Privacy Laws

Privacy legislation deals with the collection, retention, use and disclosure of personal information held by government institutions and private sector organizations.

Ontario has passed the *Freedom of Information and Protection of Privacy Act*[19] and the *Municipal Freedom of Information and Protection of Privacy Act*.[20] These privacy laws are limited to the public sector, namely to Ontario government ministries, agencies, cities and towns, but not the private or not-for-profit / NGO sectors. Government organizations are, with limited exceptions, prohibited from disclosing personal information in their control to third parties. Private sector employers cannot obtain personal information, *e.g.* medical history, from a government agency without the employee's consent.

The Federal *Personal Information Protection and Electronic Documents Act*[21] applies to the collection, use and disclosure of personal information by organizations during commercial activities. Personal information is any information about an identifiable individual whether recorded or not. Organizations can only collect personal information that is appropriate for the specific transaction; they must explain why they need the information, what it will be used for, and whether they plan to disclose it to anyone else. They must also obtain consent for this use and disclosure.

When collecting, using and disclosing employees' personal information, employers should take into account the requirements of the Ontario Human Rights Code, as well as the requirements of privacy laws. For example, in collecting information necessary for benefit plans or required by other legislation, or disclosing information to third parties, such as the Canada Customs and Revenue Agency or Employment Standards, only information that is really necessary should be collected or disclosed.

The *Canadian Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms*[22] is a constitutional document. It is described as the "supreme law" in Canada because it can be used in the courts to challenge or strike down unconstitutional laws or government practices. The *Charter* only applies to the acts and conduct of government, and does not apply to acts of, and conduct between, individuals. However, the *Code* applies to both the private and public sector, as well as to conduct between individuals.

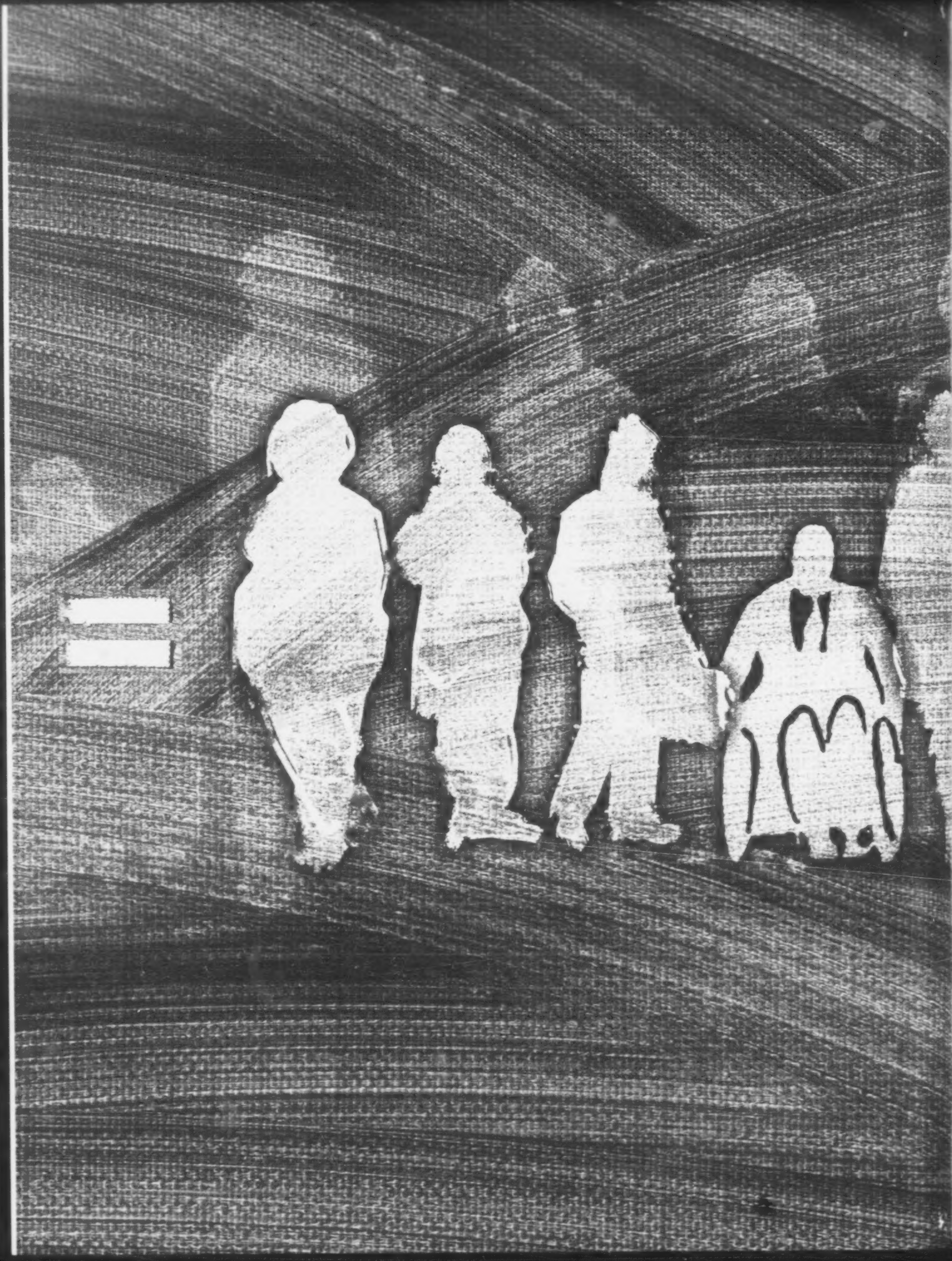
International Human Rights

Canada is a signatory to numerous international human rights conventions, documents and treaties. Examples of such documents include the following:

- the Universal Declaration of Human Rights;
- the International Covenant on Civil and Political Rights;
- the International Covenant on Social and Economic Rights;
- the International Convention on the Elimination of All Forms of Racial Discrimination; and
- the International Convention on the Elimination of All Forms of Discrimination against Women.

In Canada, international documents are not part of domestic law unless implemented by statute. However, the values reflected in international human rights law may aid in interpreting human rights laws, as well as the *Charter*.[23]

This means that international documents may play an important role in the interpretation of the *Code*.



iii

PRINCIPLES & CONCEPTS

Section 5 of the *Code* states:

> (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability.

part one | THE BASIC RULE: SECTION 5

> (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or disability.

"Employment" is not defined in the *Code*, but the Commission takes a broad and liberal interpretation of this term. It includes full-time and part-time employment, contract work, work done by temporary staff from agencies, probationary periods and may even include volunteer work.

The right to "equal treatment with respect to employment" covers every aspect of the workplace environment and employment relationship including job applications, recruitment, training, transfers, promotions, terms of apprenticeship, dismissal and layoffs. It also covers rate of pay, overtime, hours of work, holidays, benefits, shift work, discipline and performance evaluations.

Complaints can be filed against employers, contractors, unions, and directors or individuals such as other employees and supervisors who are responsible for discrimination and harassment in the workplace.

PRINCIPLES & CONCEPTS

part two | WHAT ARE "DISCRIMINATION" AND "HARASSMENT"?

Discrimination

Discrimination is not defined in the *Code* but is usually described as the result (impact) of treating a person unequally by imposing unequal burdens or denying benefits, rather than treating the person fairly on the basis of individual merit. It is not necessary to have an intent to discriminate under the *Code*.

Discrimination is usually based upon personal prejudices and stereotypical assumptions related to at least one of the grounds set out in the *Code*. These types of attitudes can be expressed as "isms" (ageism, sexism, racism, *etc.*) and refer to a socially constructed way of thinking about other persons based on negative stereotypes about race, age, sex, *etc.*, as well as a tendency to structure society as though everyone is the same - all young, all one gender, one race. "Isms" refer primarily to attitudinal barriers while discrimination involves actions, namely treating someone in an unequal fashion due to one of the grounds listed in the *Code* such as age, race, sex, *etc.* While racism, sexism, *etc.* will not always lead to discrimination under the *Code*, they are, however, often the cause of discrimination. Therefore, it is important from a human rights perspective to address both acts of discrimination and also ageist, sexist, racist, *etc.* attitudes that exist in society.

Once a ground of discrimination has been alleged, the individual has the burden of showing a *prima facie* case of discrimination. In some cases, it will be clear that discrimination has occurred. In other cases, it may be necessary to consider whether the treatment can be said to constitute "discrimination" in the sense of being something that is protected by human rights law. In the context of equality claims under s. 15 of the *Canadian Charter of Rights and Freedoms*, the Supreme Court of Canada has offered the following three broad enquiries as a tool for determining whether discrimination has occurred:[24]

1. Differential Treatment: Was there substantively differential treatment, either because of a distinction, exclusion or preference, or because of a failure to take into account the complainant's already disadvantaged position within Canadian society?
2. An Enumerated Ground: Was the differential treatment based on a ground of discrimination?
3. Discrimination in a Substantive Sense: What is the impact on the individual? Does the differential treatment discriminate by imposing a burden upon, or withholding a benefit from, an individual? The discrimination might be based on stereotypes of a presumed group or personal characteristics, or might perpetuate or promote the view that an individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society who is equally deserving of concern, respect and consideration. Does the differential treatment amount to discrimination because it makes distinctions that are offensive to human dignity?

i) Direct Discrimination

Direct discrimination in the workplace refers to any form of unequal treatment, based on a ground in the *Code*, that takes place on the job. It can occur when an employer adopts a practice or rule that, on its face, discriminates on a prohibited ground. For example, a male dominated workplace adopts a rule of not hiring women who wish to start a family: this would be directly discriminatory.

ii) Indirect Discrimination

Indirect discrimination takes place through another person or other means. For example, a receptionist is instructed not to take applications from applicants who are from a particular racial or ethnic background; or an employment agency acts on the instructions of a client not to refer applicants from a particular ethnic origin for a job opportunity. In these two examples, the person or persons giving the instructions are discriminating indirectly.

iii) Discrimination because of Association[25]

A person cannot be discriminated against or harassed because of his or her association, relationship or dealings with another person identified by a ground in the *Code*. This protection exists whether or not the person being discriminated against is identified by the same ground in the *Code*. For example, an employee cannot be refused a promotion because she has a close friendship with a Black employee.

iv) Constructive or Adverse Effect Discrimination[26]

Workplace rules, policies, procedures, requirements, qualifications or factors may not be directly or intentionally discriminatory but may nonetheless have an adverse effect. This may create barriers to achievement and opportunity.

The Supreme Court of Canada's decision in *Eldridge v. British Columbia (Attorney General)*[27] held that adverse effect discrimination is especially relevant in the case of disability, stating that, "In the case of [persons with disabilities], it is often the failure to take into account the adverse effects of generally applicable laws that results in discrimination".

If a workplace rule is found to create a barrier, the employer must show that the standard, factor, requirement or rule:

1. was adopted for a purpose or goal that is rationally connected to the function being performed;
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3. is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

As a result of this test, the rule or standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship. It is not sufficient to maintain discriminatory standards supplemented by accommodation for those who cannot meet them. This ensures that each person is assessed according to his or her own personal abilities instead of being judged against presumed group characteristics.[28]

The ultimate issue is whether the person responsible for accommodation has shown that accommodation has been provided up to the point of undue hardship. The procedure for assessing and providing accommodation is as important as the actual accommodation provided.

The following checklist, while not exhaustive, suggests some factors that should be considered when assessing accommodation:[29]

CHECKLIST:

- *Did the person responsible for accommodation investigate alternative approaches that do not have a discriminatory effect?*
- *Were there valid reasons why viable alternatives were not implemented?*
- *Does the workplace allow for differing standards that reflect group or individual differences and capabilities?*
- *Can persons responsible for accommodation meet their legitimate objectives in a less discriminatory manner?*
- *Is the standard properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies?*
- *Have other parties who are obliged to assist in the search for accommodation fulfilled their roles?*

In assessing whether accommodation would cause undue hardship, cost and health and safety factors are considered.

v) Discrimination through Reprisal

Every person has a right to claim and enforce his or her rights under the *Code* or to institute and participate in proceedings under the *Code* without reprisal or threat of reprisal.[30] It is a contravention of the *Code* to take reprisal or retaliate against someone who refuses to follow instructions to discriminate against another person.

Reprisals for (a) claiming or enforcing a human right, (b) refusing to discriminate directly or indirectly, or (c) rejecting sexual advances or solicitations are violations of the *Code*.

Harassment

This section provides information about harassment in employment with a focus on sexual harassment and sexual solicitation. Examples based on the most prevalent forms of harassment, such as race/race-related and sexual orientation are used throughout.

i) Harassment in Employment

Subsection 5(2) of the *Code* states that:

> *Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or disability.*

Although harassment because of sexual orientation is not included in subsection 5(2), the Commission takes the position that complaints alleging harassment because of sexual orientation can be accepted as complaints of discrimination because of sexual orientation. This position is based on the notion that harassing behaviour can become a condition of the person's employment and therefore would be a violation of the *Code* for the purposes of making a complaint. Harassment on any of the grounds of the *Code* can amount to discrimination.

"Harassment" refers to comments or actions that are unwelcome or should be known to be unwelcome.[31] Every person has the right to be free from humiliating or annoying behaviour that is based on one or more grounds in the *Code*.

Harassment requires a "course of conduct". This means that a pattern of behaviour or more than one incident is usually required. Comments or conduct do not need to be explicit to infringe a person's right to equal treatment without discrimination. Where a person is singled out and treated differently because of a *Code* ground, even where the differential treatment does not include explicit reference to the *Code* ground, there may still be a violation of the *Code*.

Example:

> *In a workplace, the only gay employee is repeatedly made the brunt of practical jokes and is ridiculed by his co-workers for no apparent reason. The workplace has a history of homophobic attitudes. It may be inferred from the particular circumstances that the treatment is based on sexual orientation although the practical jokes or ridicule may not have contained any direct reference to the employee's sexual orientation.*

Employers, people acting for employers and co-workers are prohibited from harassing others at work.

A person who is a target of harassment may be in a vulnerable situation. Therefore, there is no requirement that he or she formally object to the behaviour before a violation of the Code can be considered to have taken place, where the conduct is or should have been known to be unwelcome. It may be unrealistic to require an individual who is the target of harassment to object as a condition of seeking the right to be free from such treatment.

An employer who knew of, or should have had knowledge of, the harassment and could have taken steps to prevent or stop it, may also be liable in a human rights complaint. A person who has the authority to prevent or discourage harassment may be found responsible or "vicariously liable".[32]

ii) Sexual Harassment

Harassment in the workplace because of sex by an employer or agent of the employer or by another employee is prohibited under the *Code*.

"Harassment" because of sex means comments or actions based on sex or gender that are unwelcome or should be reasonably known to be unwelcome. This may include humiliating or annoying conduct based on the ground of sex. Harassment requires a "course of conduct", which means that a pattern of behaviour or more than one incident is usually required for a complaint to be made to the Commission. However, a single significant incident may be sufficiently offensive to be considered sexual harassment.[33]

Comments or conduct do not have to be sexual in nature. Someone may tease a person because of gender-based ideas about how men or women "should" look, dress or behave. A transgendered person is also protected at work from degrading comments, insults or unfair treatment because of gender identity.

Example:

> *A supervisor continuously interrupts a female employee during meetings or comments on her physical appearance in a way that sets her apart from male employees as not being a fully participating equal in the organization, or by making such statements as "women don't belong in the boardroom".*

As well, other prohibited grounds of discrimination such as race, creed, marital status, or disability may be intertwined with issues of gender. For persons who are members of more than one protected group certain forms of behaviour could have a particularly adverse impact.

Example:

> *Women with disabilities may feel particularly vulnerable to harassment and sexual assault. Inappropriate comments or conduct related to gender which may not necessarily be considered by some as problematic, may be viewed as particularly offensive or threatening to a woman with a disability.*

Other examples of sexual harassment and inappropriate gender-related behaviour within the meaning of the *Code* include comments, gestures and nonverbal behaviour, visual materials and physical contact. The following is not an exhaustive list but should assist in identifying what may constitute sexual harassment or inappropriate gender-related comments and conduct:

i) gender-related comments about an individual's physical characteristics or mannerisms;
ii) unwelcome physical contact;
iii) suggestive or offensive remarks or innuendoes about members of a specific gender;
iv) propositions of physical intimacy;
v) gender-related verbal abuse, threats, or taunting;
vi) leering or inappropriate staring;
vii) bragging about sexual prowess;
viii) offensive jokes or comments of a sexual nature about an employee, client, or tenant;
ix) display of sexually offensive pictures, graffiti, or other materials;
x) questions or discussions about sexual activities;
xi) paternalism based on gender which a person feels undermines his or her self-respect or position of responsibility; and
xii) rough and vulgar humour or language related to gender.

iii) Sexual Solicitation and Reprisal

The *Code* also prohibits sexual solicitation:

> *Every person has a right to be free from,*
>
> *(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or*
>
> *(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.*[14]

The right to be free from unwelcome advances or requests for sexual favours extends to actions made by a boss, supervisor or other persons in a position of power.

Examples:

> *An employer threatens to fire an employee because the employee refused to go out on a date with him or her.*
>
> *A supervisor makes unwanted sexual advances to an employee. In this situation, it may be implied, directly or indirectly, that a promotion is at risk if the advance is rejected.*

Unwelcome sexual advances or solicitation from an individual who is in a position to grant or deny a benefit to the person is another form of violation of a person's right to equal treatment. Sexual solicitation or advances can also occur between co-workers where one person is in a position to grant or deny an employment-related benefit to the other.

Example:

> *A worker makes the sharing of important job-related information with a colleague conditional upon the receipt of sexual favours from that colleague.*

Finally, a reprisal occurs when an employer, supervisor, or other person in a position to grant or withhold a benefit or advancement punishes a person because he or she rejects the sexual request. This kind of "getting even" is against the *Code*.

Example:

> *A male employee is denied a promotion because he refused a sexual proposition from his manager.*

iv) Poisoned Work Environment

An employee may feel that the workplace is hostile or unwelcoming because of insulting or degrading comments or actions that have been made about him or her and/or others based on a ground in the *Code*. When comments or conduct of this kind have an influence on others and how they are treated, this is known as a "poisoned environment." A poisoned environment cannot, however, be based only on subjective views. There should be objective facts to show that the comments or conduct result in unequal or unfair terms and conditions and an infringement of the *Code*.

Example:

> *A manager supervises a group of racially mixed workers whose first language is not English. He gets angry when a group of workers speak among themselves in Arabic during their breaks. The manager orders these employees to speak "Canadian" while they are at work, and threatens to terminate their employment if they continue speaking Arabic. Unless the manager can demonstrate that speaking English at all times at the workplace is reasonable and required in good faith in the circumstances, his behaviour could constitute harassment creating a poisoned work environment. Harassment because of language or accent may be a form of discrimination on the grounds of ancestry, ethnic origin, place of origin, or in some situations race, contrary to the* Code.

Members of a group protected under the *Code* who are not the specific targets of a discriminatory comment or action may also have a right to bring a complaint. Exposure to a negative or hostile treatment that is racially motivated has a negative impact upon other employees and may leave them wondering if they are also the target when they are not present.

EXAMPLE:

A Chinese woman works in a bakery where racial slurs and stereotypical language are common in the kitchen. None of these remarks are directed specifically to her but are directed at her Black co-workers. However, a human rights tribunal finds that she has been subjected to a racially "poisoned environment".[35]

Management has the responsibility to address situations that may give rise to a poisoned environment. A workplace that allows a poisoned environment to develop or continue may be the subject of a complaint to the Commission.

v) Examples of Harassment Based on Race and Related Grounds

In some situations it should be obvious that racially based conduct or comments will be offensive. For example, racial epithets, comments ridiculing individuals because of race or related grounds or because of religious dress, singling out an individual for humiliating or demeaning "teasing" or jokes related to race, ancestry, place of origin or ethnic origin are obviously objectionable.

Examples of racist behaviour that could create a poisoned environment and thereby violate the *Code* would include the following:[36]

- A supervisor tells an employee who is a member of a minority racial group "I don't know why you people don't go back to where you came from, because you sure don't belong here".
- Comments, signs, caricatures, or cartoons depicting minority racial or religious groups in a demeaning manner are displayed in the workplace.
- An employer tolerates racial graffiti and does nothing to remove it quickly or to prevent it.
- Demeaning racial remarks, jokes or innuendoes about an employee told to other employees, and racist, derogatory or offensive pictures, graffiti or materials related to race or other grounds such as ethnic origin.

- Racial remarks, jokes or innuendoes are made about other racial groups in the presence of employees who are members of a racial group possibly leading to an apprehension on the part of those employees that they too are "targets" when they are not present.

vi) Examples of Harassment Based on Sexual Orientation and Same-Sex Partnership Status[37]

Each situation that may be brought to the attention of the Commission through a human rights complaint will be assessed on its own merits. However, homophobic epithets, comments ridiculing individuals because of their sexual orientation or same-sex partnership status, or singling out an individual for humiliating or demeaning "teasing" or jokes related to sexual orientation or same-sex partnership status, would in most instances be viewed as conduct or comments which "ought reasonably to be known to be unwelcome."
The following are examples of behaviours that would violate the *Code*:

- Demeaning remarks, jokes or innuendo about an employee's sexual orientation or same-sex partnership status are told to other employees. These may deny the right of those persons who are the subject of the comments to be viewed as equals.
- Demeaning comments, signs, caricatures, or cartoons are displayed in a workplace. These may create a "poisoned environment" in violation of the *Code*.
- The display of homophobic, derogatory or offensive pictures, graffiti or materials is humiliating and also impairs the right of those persons who are members of the targeted group to be viewed as equals.
- Graffiti that is tolerated by an employer who does nothing to remove it may be creating a "poisoned environment". Depending on the particular circumstances, some persons may be humiliated or may experience feelings of hurt, anger and resentment because of their sexual orientation or same-sex partnership status that are not experienced by others in the same setting.

part three | GROUNDS OF DISCRIMINATION: DEFINITIONS AND SCOPE OF PROTECTION

a) Age

The *Code* provides the following definition of "age":

> *"age" means an age that is eighteen years or more, except in subsection 5(1) where "age" means an age that is eighteen years or more and less than sixty-five years.*[38]

In employment, the right to be free from discrimination because of age is limited to people 18 years and older but less than 65 years. This means that the Commission cannot accept a complaint of age discrimination in employment from a person who is under 18 or who is 65 or older.

Until the Ontario Legislature amends this definition of "age", it is not contrary to the *Code* for employers to require employees to retire at age 65 (or older) and employees cannot challenge this practice. Similarly, workers who remain employed past age 65 cannot complain if their employer treats them differently (*e.g.* in remuneration, benefits, hours, vacation, *etc.*) because of their age.

However, there is no age limitation for an employee claiming the *Code's* protection based on another ground.

Examples:

> *A complaint by a 67 year-old employee that he was not granted a promotion because of his age is not covered by the* Code *and cannot be accepted by the Commission.*
>
> *If a 67 year-old employee alleged that he was not promoted because of his race or disability, the* Code *applies.*

It is important to note, that while mandatory retirement at age 65 or another older age may be an employer's practice, it is not required by law. As well, mandatory retirement itself may be prohibited within the next few years. Employers may be well advised, therefore, in the context of "best practices", to begin to phase out mandatory retirement policies.

Mandatory retirement policies that require employees to retire before 65 years of age are discriminatory unless age is a reasonable and *bona fide* (*bona fide* means "good faith") job requirement that cannot be accommodated short of undue hardship.

Discrimination with respect to age can occur at any time in a person's life. Younger persons may experience discrimination because of negative attitudes and stereotypes about youth and experience. Older persons also may experience age discrimination with respect to employment. In some workplaces, persons over the age of 45 may be considered as "older" and thus be subject to discrimination. However, discrimination in employment against older persons can occur as early as between 40 and 45 years of age. It is important to remember that the concept of who is an "older" person may depend on the context. In some situations, for example, where the allegation relates to negative attitudes and stereotypes about aging, it may be necessary to think not in terms of absolute, but rather relative age.

Example:

> *While older workers are generally those over age 45, if the average age in q workplace is 25, a 37 year old job applicant may be turned away because of a perception that she is unable to fit in with the workplace culture. This would be discriminatory.*

b) Ancestry and Ethnic Origin

The *Code* provides protection from discrimination in employment because of "ancestry" and "ethnic origin". These terms are not defined in the *Code*. Complainants usually identify themselves as having a particular ancestry or ethnic origin in a complaint.

The terms "ethnic origin" and "ancestry" are sometimes used interchangeably. However, ancestry is more closely related to "whom" you are descended from. Ethnic origin encompasses a wider range of characteristics, including ancestry. Webster's Dictionary[39] defines "ethnic" as "of or relating to large groups of people classed according to common racial, national, tribal, religious, linguistic, or cultural origin or background".

Statistics Canada states that "ethnic origin" refers to the cultural origins of a person's ancestors. An ancestor is someone from whom a person is descended and is usually more distant than a grandparent. Other than Aboriginal persons, most people can trace their origins to their ancestors who first came to this continent. One's ancestry may originate from more than one cultural group. Ancestry or ethnic origin should not be confused with citizenship, nationality or language spoken.

c) Citizenship

Citizenship refers to citizenship from any country. Individuals should not be treated differently or harassed in employment because of their citizenship status, whether Canadian or otherwise. Citizenship is also linked to having landed immigrant, refugee and non-permanent resident status. Employers should only be concerned with whether an individual has legal status to work in Canada, rather than whether or not the person is a Canadian citizen, except in the narrow exceptions provided by section 16 of the *Code*, discussed below.

Individuals can either be Canadian citizens "by birth" or "by naturalization". "By birth" means that a person was either born in Canada or born outside Canada if, at the time of his or her birth, one or both parents were Canadian citizens and had retained Canadian citizenship. "Naturalization" means that a person was born in another country and immigrated to Canada, has become a Canadian citizen, and has been issued a Canadian citizenship certificate. Human rights law does not distinguish between the two categories.

Individuals with "landed immigrant" status are those who have been granted the right to live in Canada permanently by immigration authorities, but have not yet obtained Canadian citizenship. Some are recent arrivals, while others have resided in Canada for many years. Human rights law makes no distinction between permanent residents of Canada and Canadian citizens except in specific circumstances, noted below.

"Non-permanent residents" are individuals from another country who live in Canada and have work, student or Minister's permits, or are persons claiming refugee status in Canada.

A job advertisement may violate the Code if it limits the opportunity to those with "Canadian experience". Such a requirement can have a negative impact on recent immigrants to Canada who may lack "local" experience, although they are otherwise qualified to do the job.

A job advertisement may violate the *Code* if it limits the opportunity to those with "Canadian experience". Such a requirement can have a negative impact on recent immigrants to Canada who may lack "local" experience, although they are otherwise qualified to do the job.

Section 16 of the *Code* provides for exceptions to the general rule of non-discrimination in employment because of citizenship. An employer is permitted to discriminate based on citizenship in the following three specific situations:

- when a law requires or authorizes citizenship as a qualification or requirement;
- when a requirement for Canadian citizenship or permanent residence in Canada has been adopted to foster and develop participation in cultural, educational, trade union or athletic activities by Canadian citizens or permanent residents; and
- when the employer imposes a preference that the chief or senior executive is, or intends to become, a Canadian citizen.

d) Creed[40]

Religion or "creed" is not a defined term in the *Code*. However, the Ontario Human Rights Commission has adopted the following definition:

Creed is interpreted to mean "religious creed" or "religion." It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite.

Religion is broadly accepted by the Commission to include, for example, non-deistic bodies of faith, such as the spiritual faiths/practices of aboriginal cultures, as well as bona fide *newer religions (assessed on a case by case basis).*

The existence of religious beliefs and practices are both necessary and sufficient to the meaning of creed, if the beliefs and practices are sincerely held and/or observed.

The Code *protects personal religious beliefs, practices or observances, even if they are not essential elements of the creed, provided they are sincerely held.*[41]

Generally speaking, creed does not include secular, moral or ethical beliefs or political convictions.[42] It does not extend to religions that incite hatred or violence against other individuals or groups, or to practices and observances that purport to have a religious basis but which contravene international human rights standards or criminal law.

Atheists, who deny the existence of God, and agnostics, who believe that nothing is known or likely to be known about the existence of God, may have the *Code*'s protection if an employer seeks to impose religious views or create a religious environment in the workplace that is incompatible with agnostic or atheist beliefs.

The right to equal treatment on the ground of creed under the Code *encompasses two important principles:*

- *the law can require employers to take measures to facilitate the practice of religious observances;*
- *no person can force another to accept or comply with religious beliefs or practices.*

Everyone in the workplace has the right to have his or her religious beliefs and practices respected and accommodated. Employees must initiate this process by asking for accommodation. Employers must meet an employee's religious needs unless it would cause undue hardship. Undue hardship takes into consideration cost, health and safety.

In the context of creed, employees may seek accommodation for:

- dress codes;
- break policies;
- recruitment and job applications;
- flexible scheduling;
- flexible hours of work;
- rescheduling; and
- religious leave.

For further discussion regarding accommodation and creed, please refer to the section entitled "Meeting the Need of Employees: The Principle of Accommodation: Employees with Religious Needs".

There are exceptions to the general right of non-discrimination in employment because of creed:

- Roman Catholic Schools in Ontario have special rights guaranteed by the Constitution and by the *Education Act*.[43] The *Code* cannot affect those rights.[44] On the other hand, the *Code* does not address the rights or privileges of any other religiously-based schools and other religions do not, therefore, enjoy comparable exemption from human rights laws.
- A religious institution or organization is allowed to employ only people from a certain faith group if it serves mostly the interests of people of that faith group. This is only permitted if being of a particular faith is reasonable and *bona fide*. This exception applies to all religions.[45]

Situations may arise where protection under the *Code* of rights related to creed may clash with protection of other rights such as, for example, the right to freedom from discrimination on the basis of sexual orientation. The Supreme Court of Canada has stated that the right to freedom of religion is not unlimited. It is subject to such limitations as are necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.[46] Where such conflicts arise, the rights must be balanced: neither freedom of religion nor guarantees based on sexual orientation are absolute. In striking such a balance, the Supreme Court of Canada has noted that although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower. That is, it is one thing for a person to hold negative beliefs about homosexuality based on his or her creed; it is another thing for that person to act in a discriminatory manner towards others because of those beliefs.

e) Disability

The *Code* defines disability to include:

(a) *any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,*

(b) *a condition of mental impairment or developmental disability,*

(c) *learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,*

(d) *a mental disorder, or*

(e) *an injury or disability for which benefits were claimed or received under the* Workplace Safety and Insurance Act.[47]

While sections 10(a) to (e) of the *Code* set out various types of conditions, the list is merely illustrative and not exhaustive. Even minor illnesses or infirmities may be "disabilities" if a person can show that he or she was treated unfairly because of the perception of a disability.

Section 10(3) of the *Code* specifically protects persons who have had a disability in the past, as well as those who are believed to have, or have had a disability.

It's important to recognize that discrimination because of disability may be based as much on perceptions, myths and stereotypes, as on the existence of actual functional limitations.[48] When considering whether a person has been discriminated against because of disability, it is more important to consider how the person was treated than to prove that the person has physical limitations or an ailment. A disability may be the result of a physical limitation, an ailment, a perceived limitation or a combination of all these factors.

EXAMPLE:

A horticulturalist successfully applies for a job in her field. However, a pre-employment medical exam reveals an anomaly of the spinal column. The medical exam also indicates that she could perform the normal duties of the position in question and that she has no functional limitations. However, because of the employer's perception that she has a "disability" she is not hired. This is discriminatory.

The nature or degree of certain disabilities might render them "non-evident" to others. Because these disabilities are not "seen", many of them are not well understood in society. This can lead to stereotypes, stigma and prejudice. Examples might include:

1. non-visible conditions:
   - chronic fatigue syndrome and back pain
2. persons whose disabilities are episodic or temporary in nature:
   - epilepsy, environmental sensitivities
3. persons whose disabilities do not actually result in any functional limitations but who experience discrimination because others believe their disability makes them less able:
   - a colour blind office employee
4. persons who have recovered from conditions but are treated unfairly because of their past condition:
   - an employee who has had a stroke

Protection for persons with disabilities under section 10 explicitly includes mental illness,[49] developmental disabilities and learning disabilities. Persons with mental disabilities face unique challenges. Stigmatization can foster a climate that exacerbates stress and may trigger or worsen the person's condition. It may also mean that someone who is experiencing problems and needs help may not seek it, for fear of being labelled.

Employees who have claimed or received benefits under the *Workplace Safety and Insurance Act*[50] are also protected from discrimination under the ground of disability. In this case, there is no need to prove that the condition itself is a disability but only that such benefits have been claimed or received.

Section 17 of the *Code* provides that people with disabilities have the right to have their individual needs accommodated short of undue hardship in order to allow them to perform the essential duties of their job. Accommodation is a means of removing barriers preventing persons with disabilities from full participation in the workplace in a way that is responsive to their individual circumstances. Accommodation may include providing equipment, services or devices that will allow persons with disabilities to do their job.

For further discussion regarding accommodation and undue hardship, please refer to the sections entitled "Meeting the Need of Employees: The Principle of Accommodation" and "Employees with Disabilities".

f) Family Status

"Family status" is defined in the *Code* as being in a parent and child relationship. This definition includes biological and adoptive parents and persons who act in the position of a parent to a child such as a legal guardian. It also includes situations where employees have responsibility to provide care to elderly or sick parents. Men and women are equally protected under this ground.

The Supreme Court of Canada has also recognized that family status includes the particular identity of the complainant's family member.

It is contrary to the *Code* for an employee to be treated differently, either directly or unintentionally, because of family status. Employers have a corollary duty to accommodate employees, short of undue hardship, because of their child-care and/or elder-care responsibilities. Employers share social responsibility to provide a workplace that is reasonably flexible to meet the needs of employees with family responsibilities.

In some cases neutral workplace rules adversely or constructively affect employees. Once the discriminatory impact of a rule is shown, an employer must demonstrate that the requirement is reasonable, made in good faith, and that the individual cannot be accommodated without undue hardship. If this cannot be shown, the rule may violate the *Code*. Applied to the ground of family status, this situation frequently occurs when employers are asked to accommodate employees with family obligations.

Examples:

> *A manager must leave work at 5:00 p.m. to care for her young children. The employer frequently organizes senior managers' meetings after 5:00 p.m. Such a practice has a disparate impact on managers with child-care responsibilities.*
>
> *An employee's mother has developed Alzheimer's disease and requires greater care and assistance. The employee needs to take time during normal business hours to arrange home care in the short term and nursing home placement for the longer term. While the employee only needs a few mornings a week to arrange for care, the employer's policy requires that personal leave must be taken in full days.*
>
> *If the employer cannot show that these practices are* bona fide *requirements, then they cannot stand.*

There is a specific exception to the right to employment without discrimination because of family status. An employer can withhold or grant employment or advancement in employment to the employer's or an employee's spouse, same-sex partner, child or parent. This rule allows an employer to support or oppose nepotism in its hiring practices.

g) Marital Status

Generally speaking, marital status is being married to or in a common law relationship with a person of the opposite sex. It also includes being single, widowed, divorced or separated. For example, you cannot refuse someone employment because the person may or may not be married.

Marital status includes the particular identity of the complainant's spouse.

Example:

> *Mr. A works for B. Mr. A's wife and daughter confront B, the employer, and accuse B of having sexually assaulted the daughter when she was young. As a result, B terminates the employment of A. In this case, the Supreme Court of Canada ruled that this was discrimination based on family and marital status.*

h) Place of Origin

Individuals should not be discriminated against or harassed because they are from outside Canada or even from a particular place within Canada.

A person's place of origin is often related to other grounds in the *Code* such as his or her ethnic origin or race. The Commission's *Policy on Discrimination and Language* states that language can be an element of a complaint based on several grounds including place of origin.

A job advertisement may violate the *Code* if it limits the opportunity to those with "Canadian experience". Such a requirement can have an adverse impact on recent immigrants to Canada who may lack such experience although they may be rich in non-Canadian experience and qualified to do the job.

i) Pregnancy[58]

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is, was or may become pregnant or because she has had a baby. As only a woman can become pregnant, pregnancy is a characteristic that is linked to a woman's sex and therefore, discrimination because of pregnancy is discrimination based on sex.[59] The Supreme Court of Canada has recognized that pregnancy is fundamentally important to society and that the financial and social burdens associated with having children should not rest entirely on women.[60] Employers have a share of this social and economic responsibility.

"Pregnancy" includes the process of pregnancy from conception up to the period following childbirth and includes the post-delivery period and breastfeeding. The term "pregnancy" takes into account all of the special needs and circumstances of a pregnant woman and recognizes that the experiences of women will differ.

Special needs in pregnancy can be related to circumstances arising from:

- *miscarriage;*
- *abortion;*
- *complications because of pregnancy or childbirth;*
- *conditions which result directly or indirectly from an abortion/miscarriage;*
- *recovery from childbirth; or*
- *breastfeeding.*

As noted above, pregnancy includes the post-natal period which includes breastfeeding. Breastfeeding includes pumping or expressing milk, as well as nursing directly from the breast. Breastfeeding is a natural part of child-rearing, and so is integrally related to the ground of sex, as well as to family status. Numerous studies have demonstrated the benefits of breastfeeding for mothers, children, and their communities, in terms of physical and emotional health and development. Women should not be disadvantaged in services, accommodation or employment because they have chosen to breastfeed their children.

Subject to *bona fide*[61] requirements, denying or restricting employment opportunities in hiring, or transferring, *etc.* a woman because she is, was or may become pregnant or because she has had a baby, is a violation of the *Code*. Other work-related practices or behaviours set out in the examples below, may also constitute discrimination.

Examples:

- *An employer limits or withholds promotion opportunities or training regardless of work performance or years of service. This may include failing to inform women who are away on pregnancy leave about major developments and workplace opportunities.*
- *A pregnant woman is not assigned to a major project or team project.*
- *A supervisor is overly critical of the work of a woman who is pregnant.*
- *A manager docks a pregnant woman's time for using the washroom more frequently.*
- *A pregnant woman is made the subject of inappropriate comments or jokes.*
- *A woman is terminated with or without notice, because of her pregnancy.*
- *A woman who is pregnant is subjected to unwanted transfers.*
- *A woman who is pregnant is denied sick leave benefits.*
- *An employer refuses to cooperatively engage in a process to find appropriate arrangements to permit a woman to continue breastfeeding her child after she returns to work.*

An employee may require time off prior or subsequent to her pregnancy and/or parental leave due to pregnancy-related health reasons. In such cases, the employee can access health benefits under a workplace sick or disability plan.[62] However, the decision to take short or long-term disability leave may affect the right to take pregnancy and/or parental leave.[61] Where there is no workplace sick plan or personal insurance plan, an employee may go on an unpaid leave of absence or use vacation time for health-related reasons, including the employee's physical and mental health or the health and well-being of the fetus or child.

j) Race and Colour

Ontario has a long history of opposing racial discrimination. In 1793, Ontario became one of the first jurisdictions anywhere in the world to take action against slavery. In 1944, four years before the United Nations Universal Declaration of Human Rights, Ontario enacted the *Racial Discrimination Act*. Canada's first comprehensive human rights code was enacted in Ontario in 1962, consolidating anti-discrimination laws passed in the 1950s. The 1962 legislation prohibited discrimination on the grounds of race, colour, creed, nationality, ancestry, and place of origin, in the social areas of employment, access to services and accommodation. Freedom from racial discrimination in employment and accommodation includes protection from racial harassment.

"Colour" is also a delineated ground in the *Code*. A person's skin colour can be seen as one of several physical attributes that define a person's race.

Someone's race can often be related to other grounds in the *Code* such as their ethnic origin or place of origin. The Commission's *Policy on Discrimination and Language* states that language can be an element of a complaint based on several grounds, including race.

k) Record of Offences

A person cannot be discriminated against in employment because of a "record of offences". Record of offences is narrowly defined by the *Code* to mean a conviction for:

(a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or

(b) an offence in respect of any provincial enactment.[64]

Therefore, employment decisions cannot be based on the fact that a person has been convicted and pardoned for an offence under a federal law, such as the *Criminal Code*, or convicted under a provincial law, such as the *Highway Traffic Act*. It should be noted that this provision applies to convictions only and not to situations where charges only have been laid.

An employer can refuse to hire someone based on a record of offences if it can be shown that this is a reasonable and *bona fide* qualification.[65]

However, to benefit from this exception, the employer must show that the circumstances of the individual cannot be accommodated without creating undue hardship considering excessive costs or health and/or safety risks.

Each job situation must be assessed on its own facts but the following are examples where pardoned offences or provincial offences **may** be relevant:

Examples:

- *A bus driver has serious or repeated driving convictions.*
- *A day-care worker who works alone with children is convicted of child sexual abuse.*

l) Sex

The ground of "sex" is not specifically defined in the *Code*, although it is generally considered to be related to a person's biological sex, male or female. Men and women receive equal protection under this ground.

The right to equal treatment without discrimination because of sex also includes the right to equal treatment without discrimination because of pregnancy.[66]

There are specific exceptions to the general right to employment without discrimination because of sex:

- Certain institutions or organizations are allowed to employ people of one sex if the organization serves mostly the interests of persons of that particular sex. This exception is only permitted if being a man or a woman is reasonable and *bona fide* because of the nature of the job.[67]
- It is legal to hire someone based on sex only if an employer can show that the requirement is reasonable, *bona fide* and based on the nature of the job. However, to benefit from this exception, the employer must also show that if a person of the opposite sex applies, the circumstances of the individual cannot be accommodated without creating excessive costs, or health and safety dangers (undue hardship).[68]

- The *Code* allows a person to hire a medical or personal attendant of a particular sex for him or herself or an ill family member. This does not, however, allow agencies or health care services to send nurses or personal attendants to clients based on discriminatory preferences unless it is done pursuant to the direct instructions of the ill person or a family member of the ill person.[69]

Gender Identity

"Sex" also includes a broader notion of "gender", which can be described as the social characteristics attributed to each sex. The *Code* protects men and women from harassment and discrimination at work, regardless of their sex and assumptions about their professional abilities that result from stereotypes about how men and women "should" behave, dress or interact. The Commission takes the position that the *Code* protects both gender and gender identity. This means that transgendered persons are also protected on the ground of sex for complaints related to gender identity.[70]

The term "transgendered" refers to a range of behaviours linked to an individual's sense of self, based on psychological, behavioural and cognitive factors. It is used by individuals who reject (or are not comfortable with) their birth-assigned sex. It is not related to a person's sexual orientation. A person's gender identity is fundamentally different from and does not determine their sexual orientation.

Complaints related to gender identity are made almost exclusively by transgenderists[71] and transsexuals[72]. There are, arguably, few groups in our society today who are as disadvantaged and disenfranchised as transgenderists and transsexuals. Fear and hatred of transgenderists and transsexuals combined with hostility toward their very existence are fundamental human rights issues.

Denying or restricting employment opportunities in hiring, training, promotion, transfers, *etc.* because of gender identity is a violation of the *Code*.

Examples:

- *An employee advises her employer that she will be taking time off work to undergo sex-reassignment surgery. The employer grants the employee the time off but when the employee returns to work after the surgery, she is terminated.*
- *A woman working on a temporary basis is offered a full-time position as a customer service associate by her supervisor on the condition that she wear dresses and change her hairstyle to a more feminine one. The employer believes this is necessary because the customers will not like the woman's overly masculine appearance.*
- *An employee discloses to his manager that he cross-dresses. The manager subsequently tells the employee that he will no longer qualify for promotions or further career training because customers and co-workers will be uncomfortable with him.*
- *A transgendered employee, who presents as a female, is not permitted to wear clothing typically worn by women at the workplace.*

Gender identity is a personal characteristic that may or may not be known to others. While most people are not concerned about others knowing their gender identity, this may not be the case for transsexuals and transgenderists. Despite the protections set out in the *Code*, individuals who identify or are identified as transsexual or transgendered face the very real possibility of being subjected to overt or subtle discrimination and/or harassment. This can be particularly detrimental in the workplace.

An employer or service provider who legitimately requires and collects personal information that either directly or indirectly identifies a person's sex, which may be different from his or her gender identity, must ensure the maximum degree of privacy and confidentiality of the information. This applies in all situations and circumstances including employment records and files, insurance company records, medical information, *etc.* The information might be required, for example, to enable an employee or individual to claim or register for benefits. All information should remain exclusively with designated personnel (such as the human resources person) in a secure filing system in order to protect the individual's confidentiality.

The following are examples of situations where confidential information is routinely collected:

- birth certificate;
- driver's licence;
- identification of next of kin;
- identification of beneficiary for insurance purposes; and
- applications or claims for health benefits.

An employer or service provider who fails to properly safeguard personal information about an individual's sex or gender identity may infringe the *Code*.

A complaint could be made where this results in a person being subject to discrimination and/or harassment because of his or her gender identity.

m) Sexual Orientation and Same-sex Partnership Status

The *Code* prohibits discrimination in employment on the basis of sexual orientation and on the basis of same-sex partnership status. This ground protects gays, lesbians, bisexual and heterosexual persons.

While "sexual orientation" is the term generally used to refer to a person's sexual attraction to persons of another gender and/or one's own gender, it is not defined in the *Code*. The Human Rights Commission has, however, developed and adopted the following definition of sexual orientation:

> *Sexual orientation is more than simply a "status" that an individual possesses; it is an immutable personal characteristic that forms part of an individual's core identity. Sexual orientation encompasses the range of human sexuality from gay and lesbian to bisexual and heterosexual orientations.*[73]

The *Code* covers all types of unequal treatment, from the loss of employment to comments, displays and jokes that may make an individual uncomfortable because of sexual orientation.

Example:

> *An employee discloses to his manager that he is gay. The manager subsequently tells the employee that he will no longer qualify for promotions, postings, or further career training.*

A person does not actually have to prove that he or she is of a particular orientation or be lesbian, gay, bisexual or heterosexual, as long as it can be shown that there was unequal treatment because of sexual orientation.

Example:

> *A female sales representative who shares a house with another woman is not included in a particular sales meeting that also includes employee spouses. The employee's manager has made the decision based on his concerns that the employee might bring the other woman and they would not fit in at the meeting. Whether or not the female sales representative is a lesbian, she can file a complaint with the Commission because she was subject to unequal treatment because of sexual orientation.*

"Marital status"[74] and "spouse"[75], as defined in the *Code*, do not include same-sex relationships. In the case of *M. v. H.*[76], the Supreme Court of Canada found that an opposite-sex definition of "spouse" in the *Family Law Act* was unconstitutional and contrary to the *Canadian Charter of Rights and Freedoms* and should include same-sex partners. As a result of the landmark decision, the Government of Ontario passed Bill 5, *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*[77] The *Act* amended 67 Ontario statutes, including the *Code*, to recognize same-sex partners and same-sex partnership status.

Section 10(1) of the *Code* defines "same-sex partner" as the person with whom a person of the same sex is living in a conjugal relationship outside marriage. "Same-sex partnership status" is defined as the status of living with a person of the same sex in a conjugal relationship outside of marriage.

Section 25(2) of the *Code* and other provincial statutes that govern provision of benefits include same-sex partnership status. Therefore, individuals in same-sex partnerships are entitled to the same benefits as individuals in opposite-sex relationships with regard to employee superannuation or pension plans or funds or a contract of group insurance between an insurer and an employer that complies with relevant legislation and regulations.

PRACTICE TIPS:

- *An employer must provide individuals in same-sex relationships with the same spousal benefits provided to individuals in opposite-sex relationships under their pension benefits plan and insured health benefits.*
- *A pension plan must provide same-sex partners with the same employment survivor benefits that are provided to opposite-sex partners.*
- *An employer must provide equivalent survivor benefits to its gay and lesbian employees as it does to its heterosexual employees.*

n) Multiple/Combined Grounds of Discrimination

Complaints to the Ontario Human Rights Commission frequently involve more than one ground as a basis for the complaint.

Cases involving multiple grounds of discrimination, *e.g.*, race, age and gender, produce something unique and distinct from any single form of discrimination based on one ground only. Understanding discrimination requires attention to the full context of a person's identity, which includes his or her race, gender, sexual orientation, age, *etc.*

The following is an example of how an intersectional approach to the multiple grounds of discrimination is applied.

Example:

> *A 55-year-old woman alleges that she is refused a job as a waitress because she doesn't fit the image that the restaurant is trying to promote. The evidence reveals that the restaurant employs many younger women as waitresses as well as older men as waiters and maitre d's. The fact that older persons (men) are employed and younger women are employed does not necessarily defeat her claim of discrimination as there may be unique stereotypes attributed to older women with regard to image or attractiveness.*

iii PRINCIPLES & CONCEPTS

part four | LEGAL RESPONSIBILITY FOR HUMAN RIGHTS AT WORK

a) Employers

Employers have the primary obligation to ensure that their workplace is free from discrimination and harassment.

Employers cannot contract out of the protections in the *Code* with employees or with unions. An employer, jointly with employees and (if applicable) the union, is responsible for finding the most appropriate way to accommodate employees' needs that are protected by the *Code*. The extent of this obligation is limited only by undue hardship.

Employers are obliged to ensure that their work environment is free from discriminatory and harassing behaviour. An employer violates the *Code* where the employer:

i. directly or indirectly, intentionally or unintentionally infringes the *Code*;

ii. constructively discriminates;

iii. does not directly infringe the *Code* but rather authorizes, condones, adopts or ratifies behaviour that is contrary to the *Code*.

As well, where an employee contravenes the *Code* in the course of employment, this may engage the employer's liability. This only applies to discriminatory conduct and not to cases of harassment.[19]

Finally, an employee who is a "directing mind" of a corporation who discriminates against or harasses anyone in a manner contrary to the *Code*, or who knew of the harassment and did not take steps to remedy the situation, also engages the liability of the employer.

Generally speaking, an employee who performs management duties is part of the "directing mind" of a company. Even employees with only supervisory authority may be viewed as part of a company's "directing mind" if they function, or are seen to function, as representatives of the organization. Non-supervisors may be considered part of the "directing mind" if they have *de facto* supervisory authority or have significant responsibility for the guidance of employees. For example, a member of the bargaining unit who acts as a lead-hand may be considered to be part of the "directing mind" of an organization.

An employer should take immediate remedial action once made aware of harassing conduct. If an allegation of harassment has been substantiated, appropriate action should be taken. This may include disciplinary action. Preventative measures, such as policy statements and educational initiatives, should be considered.

An employer's liability for harassment committed by its employees and agents is not necessarily limited to the workplace or work hours. Human rights law includes the notion of the "extended workplace". Liability could attach to behaviour or actions that occur away from the physical workplace but that have implications or repercussions in the workplace. For example, staff may be held liable for discriminatory incidents taking place during business trips, company parties or other company-related functions.

Human rights issues arising in a workplace must be afforded an employer's utmost attention and diligence. It is important not to discount an employee's version of events even if there are no witnesses because it is frequently the case that many forms of harassment are carried out without witnesses. Evidence may be found through repeated patterns of similar behaviour by the respondent, serious inconsistencies in the respondent's story or through careful and credible record-keeping by the complainant.

Human rights complaints often contain serious allegations. No liability is determined until a decision is reached following a fair and thorough investigation and based on the facts of the case. However, if the allegations are such that there is a possibility of harm to either party, steps should be taken to protect the complainant and ensure that the parties are not in contact with each other at the workplace.

If an allegation of discrimination or harassment is made at the workplace, an employer has the responsibility to protect the privacy of the parties involved, whether or not the employer itself is implicated. This is true whether the matter is being handled under a company's anti-discrimination/anti-harassment policy or through a complaint to the Commission. All aspects of the process should be handled with confidentiality. Employers should not take sides either, especially if the matter involves co-workers.

b) Senior Managers

Senior managers are part of the "directing mind" of the employer and, consequently, their actions are considered to be those of the organization itself. Therefore, an employer is liable for any breach of the *Code* committed by a senior manager.

If a senior manager knew of the workplace harassment or the existence of a "poisoned environment" and failed to take steps to remedy the situation, the organization could also be held liable. Therefore, upon becoming aware of harassment, a senior manager should take prompt and appropriate steps to remedy the situation. This may involve arranging for an independent professional to mediate, to facilitate dialogue between the parties or to conduct an investigation and, if warranted, to suggest appropriate discipline. Having a clear and effective anti-discrimination policy that is regularly reinforced through training can help a senior manager know what to do when made aware of such situations.[79]

c) Employees

Employees have the legal responsibility to treat fellow employees in a manner that is consistent with the *Code*. A co-worker who infringes a right of another employee can be named as a personal respondent in a human rights complaint. This may include not only co-workers who are at the same level in the organization, but also discriminatory treatment by any employee against any other employee in the organization, regardless of the employee's level.

> *An employee who seeks accommodation for a need related to a ground in the Code has the obligation to provide sufficient information to the employer and to specify what form of accommodation is required.*[80]

In the case of persons with disabilities, enough information must be provided to assert the existence of the disability (but not the nature of the disability) and the nature and extent of the restrictions in order to allow the employer to assist. This may include information from a qualified professional confirming the existence of a disability and stating the type of accommodation needed. There rarely is any need to explicitly inform an employer of the particular nature of the disability. Employees must also cooperate to enable the employer to deal with their accommodation request.

d) Non-employees

Non-employees, such as clients or customers, who act in a discriminatory or harassing manner, are not personally subject to the *Code*. In other words, they cannot be named as personal respondents in a human rights complaint. However, an employer may be liable for the behaviour of non-employees depending on the facts of a particular situation, including the employer's knowledge of, and control over, the situation and what could have been done to prevent or stop the behaviour.

e) Unions

Unions and employers have a joint duty to ensure that workplaces are free of discrimination and harassment. A union should attempt to ensure that human rights are protected explicitly in the collective agreement. A union cannot contract out of the provisions of the *Code* with an employer.

Unions have the duty to accommodate in two situations[81]:

1. Where the union causes or contributes to discrimination by participating in the formulation of a rule, usually in the collective agreement, that has a discriminatory effect. Although an employer who has charge of the workplace is in a better position to formulate measures of accommodation, a union still must cooperate in attempting to find appropriate solutions. Unions share the obligation to remove or alleviate the source of the discriminatory effect.

Example:

> *In a 1992 Supreme Court of Canada case[82], a school custodian complained that the school board and the union had failed to agree on how to modify his shift hours. As a Seventh Day Adventist, he was unable to work Friday afternoons. The Court determined that the union, together with the employer, had a duty to accommodate the school custodian, short of undue hardship.*

2. Where a union impedes the reasonable efforts of an employer to accommodate. A union must be supportive of an employer's efforts to comply with the *Code*.

Example:

> *In an Ontario case,[83] an employer had agreed to accommodate an employee's religious beliefs by rescheduling a work-day from Saturday to Sunday but only if she did not receive Sunday premium pay as required by the collective agreement. However, the employer's attempt to accommodate was blocked by the union who insisted on premium pay. The Ontario court determined that the union had infringed the* Code *by blocking the accommodation measure.*

A union can, of course, also be an employer and has the same legal obligations as any employer.

f) Employment Agencies

An employer cannot use an employment agency to hire people based on preferences related to age, race, sex, disability or other grounds of the *Code*.[84]

Example:

> *A company cannot ask an agency to send only "persons of European background" to fill a receptionist position.*

Employment agencies cannot screen applicants based on discriminatory grounds and are not allowed to keep records of client "preferences" of this kind.

If a temporary employee is referred by an agency and then requires assistance to meet his or her special needs, it would be the joint responsibility of the agency and the employer to arrange accommodation.

g) Franchisors

Franchisors may be held liable for discriminatory conduct or harassment by a franchisee depending on the nature of the franchise agreement. This is more likely to occur where the franchise relationship is such that the franchisor exercises significant control over the franchisees' operations or where the franchisor contributes directly or indirectly to the discriminatory conduct or harassment. Franchisors are also responsible for their own actions and policies.

part five | WHO IS PROTECTED AT WORK?

a) Employees

"Every person" has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, disability, age, marital status, same-sex partnership status, family status and record of offences.

The definition of "employee" does not appear in the *Code*. However, using a liberal interpretation, the Commission takes the position that the protection of the *Code* extends to employees, temporary, casual and contract staff, as well as other persons in a work context, such as persons who work in order to gain experience or for benefits.

b) Temporary and Casual Staff

The *Code* protects temporary and casual staff regardless of how long the person may have worked for the organization. This protection even exists where a person is not actually an employee but was sent by an employment agency. Employment agencies have a responsibility to ensure that the staff they send on assignments are in a workplace that is free from discrimination and harassment. If they become aware of a situation that may violate the *Code* and do not take action, they may be named in a complaint.

EXAMPLE

A company hires a woman from an employment agency on a temporary basis to file documents. Her supervisor makes jokes and derogatory comments about the woman's religious beliefs. This conduct is a form of harassment and the employee has the right to complain to the Commission against the company. If the employment agency, after being advised of the harassment, fails to take steps to remedy the situation, the employee could also file a complaint against the employment agency.

c) Personnel Under Contract

A contract is an oral or written agreement that is legally enforceable. Employment arrangements are a form of contract. All types of contracts are covered by the *Code*, including those with independent contractors and sub-contractors, as well as contracts that outline terms of employment. Anyone who is legally capable of entering into a contract has the right to do so equally with any other person without being discriminated against because of one of the grounds in the *Code*.[85]

It is a condition of every contract signed with an Ontario Government ministry or agency that no person may be discriminated against in carrying out that contract.[86] This includes Ontario government loans and grants. The contract, loan, grant or guarantee can be cancelled if a human rights tribunal finds that a person employed under the contract has been discriminated against while it was in effect.

d) Volunteers and Other Workers

The *Code* does not refer specifically to volunteers but the Commission takes the position that the phrase "equal treatment with respect to employment" in section 5 can be interpreted to protect anyone in a work-like context. This includes volunteer services and individuals who work without a salary to gain experience, such as those on a practicum or being mentored. It also covers those who work for benefits.

While there have been no Ontario decisions on these issues, some British Columbia decisions found that the province's human rights law applied to discrimination against a volunteer, under the areas of employment and services.[87]

e) Medical and Personal Attendants

Persons hired as medical or personal attendants have a right to equal treatment under the *Code*.

PRINCIPLES & CONCEPTS

part six | MAKING THE WORKPLACE ACCESSIBLE FOR PERSONS WITH DISABILITIES

a) Inclusive Design

Achieving integration and full participation for persons with disabilities requires barrier-free and inclusive designs and removal of existing barriers. Preventing and removing barriers means persons with disabilities should be able to access their environment and face the same duties and requirements as everyone else with dignity and without impediment.

Inclusive design is the approach that is most respectful of the dignity of persons with disabilities. When constructing new buildings, undertaking renovations, purchasing new computer systems, launching new Web sites, or setting up new policies and procedures, design choices should be made that do not create barriers for persons with disabilities.

Where barriers exist, barrier removal maximizes integration with one's environment so that everyone is able to participate fully and with dignity. Identifying and removing systemic barriers also makes good business sense. It may reduce and prevent the filing of human rights complaints and can make facilities and procedures more comfortable for other groups such as seniors and for all people in general.

It is important to remember that compliance with standards set under the *Building Code* does not ensure that facilities are barrier-free, or meet the accessibility requirements of the *Code*. For example, while the provisions of the *Building Code* set out standards relating to barrier-free wheelchair access, there are, however, no other standards with respect to non-mobility disabilities: *i.e.* blindness/visual impediment, hearing disorders, mental disorders, learning disabilities, *etc.*

Example:

> *Persons with non-mobility-related disabilities such as mental disorders, learning disabilities, low vision, hard of hearing, etc. may have needs not dealt with by the* Building Code. *For example, directional indicators for elevators and exits may be of assistance to persons who have memory disorders. Tactile signage would assist persons with low vision in matters as basic as finding the correct floor on an elevator and entering the right washroom. Alarm systems do not require visual as well as auditory signals, thereby increasing the danger to persons who are deaf, deafened or hard of hearing in the event of an emergency. While they do not have to be included as the* Building Code *does not require them, failure to include such features would be unacceptable from a human rights perspective.*

The Human Rights Code's *guiding principles with respect to accessibility are:*

- *Does the requirement allow the person with a disability access that ensures equality of outcome ("substantive accessibility")?*
- *Does the requirement result in approximately equal levels of convenience?*
- *Has the dignity of the person been respected?*

b) Accessibility Review

Employers should consider developing accessibility review plans, undertaking reviews and implementing the necessary changes to make facilities, procedures and services accessible to employees with disabilities, as well as to clients or customers with disabilities.

Conducting the accessibility review will show to what extent an organization is accessible to persons with disabilities and what needs to be done.

PRACTICE TIPS:

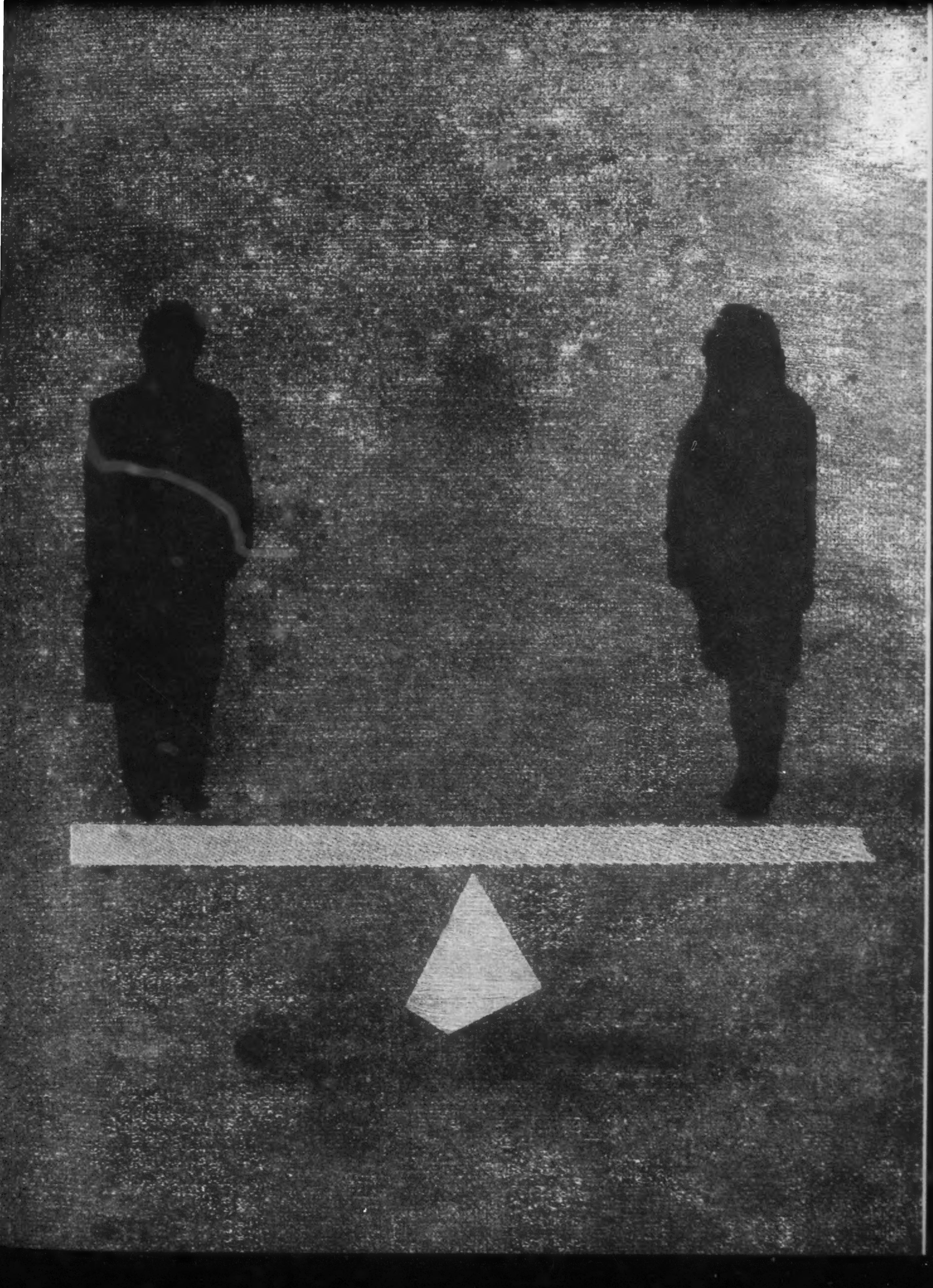
A comprehensive accessibility review plan should:

- *state the purpose of the review plan along with a rationale, context and guidance for conducting a review;*
- *acknowledge an organization's obligations under the* Code *to ensure accessibility for employees, clients or customers with disabilities;*
- *identify internal and external resources that would provide guidance for conducting the review;*
- *summarize current internal and external initiatives;*
- *identify quality service measures;*
- *outline the scope of the review and identify potential barriers as they may relate to procedures and practices, facilities, services and communications;*
- *outline timeframes and responsibilities around conducting an accessibility review of the organization; and*
- *outline a communications plan for the accessibility review so that senior management, staff, members, clients, etc. are aware and supportive of the initiative and its purpose.*

Results of the accessibility review should be documented in a Summary of Findings and Recommendations Report and submitted to senior management. Senior management should make the results available to all concerned along with a plan for undertaking barrier-removal.

Accessibility review plans and barrier removal are up-front ways that an organization can address the needs of persons with disabilities. Developing and using a disability accommodation policy will also help an organization meet its duty to accommodate the individual needs of employees and customers with disabilities in accordance with the *Code*. Such a policy will make it clear to both employees with disabilities, others who require accommodation, and managers responsible for providing accommodation what company procedures are in place to assist persons with disabilities effectively.

Resources are available to help with disability access and accommodation planning. The Ministry of Citizenship, Culture and Recreation Web site (http://www.equalopportunity.on.ca) offers information and links including JANCANADA (Job Accommodation Network Canada), which provides free professional advice to employers on specific job accommodations. JANCANADA can be reached at 1-800-JAN-CANA (1-800-526-2262).



iv

TERMS AND CONDITIONS OF EMPLOYMENT

The right to equal treatment with respect to employment protects individuals in all aspects of employment including applying for a job, recruitment, training, transfers, promotions, terms of apprenticeship, dismissal, and layoffs. It also covers rate of pay, overtime, hours of work, holidays, benefits, shift work, performance evaluations, discipline, and termination.

part one | DESIGNING A JOB

a) Inclusive Design

Workplaces should be designed to be inclusive of all who work there, regardless of sex, race, creed, family status, disability, or other *Code* grounds. When establishing new policies and procedures, purchasing new computer and/or phone systems, designing or choosing work stations, *etc.*, design choices should be made that do not create barriers for persons protected under the *Code*. Inclusive design is the approach that is most respectful of dignity. For example, break policies should take into account, where possible, the needs of pregnant or breastfeeding women, persons whose religion may require them to take time to worship during the work day, and persons with disabilities.

Example:

> *The manager of a customer service department will be upgrading the department's computer and phone systems in the new year. The new computer and/or phone systems should include enhanced options for large fonts, brighter lighting and volume. All such options would give all existing and future workers the ability to adjust for visual or hearing impairments that might exist or might develop as the worker ages.*

b) *Bona Fide* Occupational Requirements

All jobs include the performance of certain occupational tasks that may be considered requirements. If a person is prevented from meeting these requirements for a reason that is related to a ground in the *Code*, human rights law examines whether these requirements are reasonable and *bona fide*.

A requirement can be directly discriminatory.

Example:

> *A health club has a requirement that staff in a men's locker room must be men. This requirement would meet the test for a reasonable and* bona fide *occupational requirement.*

A requirement, qualification or factor that is neutral and non-discriminatory on its face, may nonetheless exclude, restrict, or prefer some persons because of a ground set out in the *Code*.[iii] This is often called "adverse effect", or "constructive" discrimination.

Example:

> *An employer has a rule that male employees must be clean-shaven. This rule results in the employer refusing to hire a Sikh man. This rule is not intended to exclude Sikh men (who as a part of their religion are not allowed to shave) from employment but it has this effect and therefore would be considered constructive or adverse effect discrimination.*

Even if this rule is shown to be reasonable and *bona fide* (*i.e.*, the employer shows that the purpose of the rule is rationally connected with performance of the job and the rule was established in good faith), the employer will only be able to insist that Sikh men observe the rule if creating an exception will cause undue hardship to the employer. In this example, the business objective may be to ensure hygiene in food preparation. However, Sikh men can easily be accommodated by allowing them to wear a net to cover their beard, which should not cause the employer undue hardship.

Test for *Bona Fide* Requirement

Whether the discrimination is direct or by adverse effect, the Supreme Court of Canada has set out the same three-step test for determining whether a discriminatory standard, factor, requirement or rule can be justified as a *bona fide* requirement.[59]

The respondent must establish on a balance of probabilities that the standard, factor, requirement or rule

1. was adopted for a purpose or goal that is rationally connected to the performance of the job;
2. was adopted in good faith, in the belief that it is necessary for the fulfilment of that legitimate work-related purpose, and
3. is reasonably necessary to accomplish the work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

As a result of this test, the rule or standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. This ensures that each person is assessed against his or her own personal abilities instead of being judged against presumed group characteristics.

The ultimate issue is whether the person who seeks to justify the discriminatory standard, factor, requirement or rule has shown that accommodation has been incorporated into the standard up to the point of undue hardship.[60]

In this analysis, the procedure used to assess and achieve accommodation is as important as the actual accommodation itself. The following checklist provides a non-exhaustive list of factors that should be considered in the course of the analysis:

CHECKLIST:

- *Has the employer investigated alternative approaches that do not have a discriminatory effect?*
- *If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?*
- *Could standards that reflect group or individual differences and capabilities be established?*
- *Is there a way to both do the job and accomplish the employer's legitimate purpose that is less discriminatory?*
- *Is the standard properly designed to ensure the desired qualification is met without placing undue burden on those to whom it applies?*
- *Have other parties who are obliged to assist in the search for accommodation fulfilled their roles?*

Requirements that are not Bona Fide

The following are examples of requirements that will not be considered to be reasonable or *bona fide*, namely requirements that:

- relate to incidental duties rather than essential components of the job;
- are based on co-worker or customer preferences and exclude persons because of grounds protected in the *Code*;
- rely upon stereotypical assumptions to assess an individual's capacity to perform the job duties. For example, a position that requires child care workers to be women is unfair to men who are also qualified for the position;
- state that the job be performed only in a certain way where reasonable alternatives may exist so that persons are not excluded because of grounds protected in the *Code*; and

- reinforce role-modeling based on traditional or stereotypical ideas about the appropriate roles of men and women.

c) Physical Demands Analysis

Every job is different in terms of physical activity. Activity may range from something sedentary, like sitting at a desk and looking at a computer screen, to something very physically active, like driving a delivery truck and lifting heavy packages. Regardless of where a job is on the physical activity continuum, every job has a physical aspect to it.

When developing a job description, it is prudent to consider the necessary or essential physical requirements of the job and provide this information to prospective job applicants. Once a conditional offer of employment is made, a person can be asked to review the physical demands of the position and indicate whether they require accommodation to perform the essential requirements of the job. Physical demands analyses should, however, be used with care since they are often developed with an able bodied person in mind. Care should be taken to design or redesign analyses so that they are not exclusionary.

d) Essential Requirements

Job descriptions contain many elements. Some may be essential to the performance of the job, and some may be ideal or preferable, but not essential. The challenge is to recognize and understand the difference between the essential requirements and the non-essential requirements of the job.

Identifying what is essential is especially important because a job applicant or employee may request accommodation because of a disability. The right to equal treatment is not infringed when a person is treated differently because she or he is incapable of carrying out the essential duties or requirements of the position because of disability after the person has been accommodated short of undue hardship.[illegible]

Assessing incapacity must be done objectively and accurately and not for the purpose of defeating the principles contained in the *Code*.

Example:

> *A company is looking for computer salespersons. The job description states that the person must be able to lift 20 kilograms, the weight of the computers, because the person has to deliver the product to customers. If the person is being hired as a computer salesperson, knowledge of computers and information technology is essential, but the ability to lift and deliver computers would likely not be essential and could be severed from the job description.*

With time, a job can change. This may result in the addition of new responsibilities that may be essential and non-essential. It is important to consider or reconsider the job description when looking to fill a position. Three questions should be asked:

1. Is the job description current or does it need to be updated?
2. Does the job description accurately reflect the needs and expectations of the employer?
3. Which are essential requirements and which are non-essential?

The responses to these questions will be useful when looking to fill a job without creating artificial barriers that prevent a person from being fairly considered for the job.

e) Special Requirements

i) Driver's Licence

A driver's licence contains personal information about an individual such as age. This could allow the employer to assess applicants according to a prohibited ground of discrimination. Employers should identify the jobs for which driving is an essential requirement and ensure that this is included in the job description. The employer should only ask for a driver's licence number or a copy of a driver's licence after a conditional offer of employment has been made.

ii) Language and Fluency

The *Code* does not include language as a prohibited ground of discrimination. Nevertheless, there is usually a link between the language we speak and the accent with which we speak a particular language on the one hand, and our ancestry, ethnic origin or place of origin on the other. Therefore, a complaint could be made to the Commission if an employer designs a job to require a certain level of fluency in English or any another language, or to prohibit an accent, if these requirements are not *bona fide* requirements for the performance of the job.

When an employer identifies "proficiency" in a language as a requirement, it must be reasonable and *bona fide*. That is, it must meet the test set out above, in the section "*Bona Fide* Occupational Requirements". The requirement must focus on the particular language needed in the job, and not on the place of origin, ancestry, ethnic origin or race of candidates for the position.

Example:

> *An employer is seeking an employee who speaks fluent Spanish in order to serve the employer's Hispanic clients, who are predominantly from Central America. If an applicant speaks Spanish and English fluently, but does not come from a Central American country, she or he should not be denied the position based on place of origin.*[92]

iii) Requirements Related to Race and Related Grounds, Ethnic Origin, Creed, Sex, Disability, Age, Marital Status and Same-sex Partnership Status

Subsection 24(1)(a) allows certain special interest organizations to prefer hiring people based on their membership in the above-noted groups if the organization serves mostly these groups. This exception applies only to religious, philanthropic, educational, fraternal or social institutions or organizations and only where the exception is reasonable and *bona fide* because of the nature of the employment.

Special interest organizations might include:

- religious organizations that adhere to a particular system of faith and worship such as a church or religious order;
- philanthropic organizations that perform acts of benevolence, and include many organizations that are registered as charities under the Federal *Income Tax Act*;
- educational organizations such as schools or colleges and other institutions that offer instruction and training of a moral, religious, vocational, intellectual or physical nature;
- fraternal organizations formed for mutual aid or benefit, but not for profit; or
- social organizations providing social or cultural benefits (*e.g.*, a cultural club serving a particular ethnic group).

If an organization is one of these, it may be permissible to design a job in order to hire someone who is identified or preferred based on a ground in the *Code*.

Subsection 24(1)(b) also allows an employer to hire based on age, sex, record of offences, marital status or same-sex partnership status but only where an employer can show that the requirement is reasonable and *bona fide* because of the nature of the employment.

Example:

> *A school board that wishes to hire school bus drivers would be able to require that applicants have no convictions for careless driving.*

The employer has to show that a requirement is reasonable and *bona fide* and that accommodation would cause undue hardship.

iv) Citizenship Requirements

Section 16 of the *Code* allows an employer to discriminate based on citizenship in three very specific situations, which are:

- when citizenship is a qualification or requirement imposed or authorized by law;
- when the requirement for Canadian citizenship or permanent residency in Canada has been adopted to foster and develop participation in cultural, educational, trade union or athletic activities by Canadian citizens or permanent residents; and
- when the employer imposes a preference that the chief or senior executives be, or intend to become, Canadian citizens.

The employer should include any of these citizenship requirements in the job description in order to avoid any misunderstandings by applicants.

v) Men-only or Women-only Requirements

An employer can design a job that specifically requires a man or a woman for the position. However, it can only do this if sex is a reasonable and *bona fide* requirement because of the nature of the job.[93]

Example:

> *A woman's shelter advertises for support counsellors and states that applications will only be accepted from women. In this situation, the nature of the work would mean that gender could be a reasonable and* bona fide *requirement of the job.*

vi) Medical or Personal Attendants

The *Code* permits a person to decide to employ a medical or personal attendant for him or herself or for a family member based on one of the discriminatory grounds listed in the *Code*.[94]

vii) Customer preference

Customer preference or other third-party preferences cannot be used as justification to discriminate. Unless an exception applies (such as section 24 of the *Code*) an employer cannot use "requirements" from customers or other third parties that are not reasonable and *bona fide* to exclude people because of a ground in the *Code*.

f) Special Programs[95]

Section 14 of the *Code* permits special programs in employment that would otherwise infringe the *Code*. Special programs help people who experience discrimination, economic hardship or disadvantage to achieve equality and reduce discrimination through measures that create jobs, provide specialized services or other opportunities.

A special program is one that is designed to:

- relieve hardship or economic disadvantage;
- assist disadvantaged persons or groups to achieve equal opportunity; or
- contribute to the elimination of the infringement of rights protected under the *Code*.

A program must satisfy one of the above criteria before it can be a special program as defined by the *Code*. There are many types of programs that might fall within section 14. It is important to make sure that people are aware that a special program exists and that there are restrictions or limits as to who is eligible to apply for a job, or who is entitled under a special program to obtain certain services.

Example:

> *A job program for people under 25 is put into place to combat youth unemployment. The job advertisement for this program should clearly explain to potential applicants or to the public that the position is part of a special program designed to assist youth under 25 years of age.*

i) Eligibility Criteria

The program should clearly identify whom the program is intended to assist:

- identify the grounds under the *Code*: *e.g.*, race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, disability, record of offences; or
- identify the disadvantaged persons or groups who are experiencing hardship or economic disadvantage.

Care should be taken to ensure that the program is not unreasonably restrictive, especially when the restrictions might themselves be considered discriminatory under the *Code*. There should be a rational connection between any restrictions in eligibility and the purpose of the special program itself.

Example:

> *Based on information from Statistics Canada which indicates that children from low-income families are chronically unemployed, Sunny Times Community Services develops and implements a summer employment program which is only for high school students from low-income families.*

ii) Rationale for Program

The special program should also:

- state clearly the reasons why the identified persons or groups are considered to be experiencing hardship, disadvantage, or discrimination;
- explain how the proposed measures will relieve this hardship, economic disadvantage, or discrimination, or how they will assist in achieving equal opportunity; and
- indicate that the special program is for a specific time period and is of a temporary nature.

Evidence of hardship or disadvantage should be objective and, where possible, quantifiable. It should not be subjective or based on personal impressions. When developing a special employment program one should ask, "Is there a real problem and does this program address it?".

Data collection for monitoring and evaluation purposes is permitted by the *Code* in the context of a special program. Data may also be collected if the information is used to demonstrate under-representation of particular groups or other forms of hardship or disadvantage. Data collection of this type can, for example, determine the racial background of a workforce in order to put into place a program.

Example:

> *An employer is planning to expand the company and hire new staff. The employer conducts a work survey to see whether the workforce is representative of the community that it serves. Employees are asked to voluntarily self-identify and to submit the information anonymously to human resources.*

Statistics collected on an on-going basis also provide a means of assessing the results of special program initiatives and can serve as a tool for assessing the need for further measures.

The *Code* does not specify how or even if the collection of data should take place. There are some standard methods to identify groups within or served by an organization:

- conduct voluntary self-identification surveys;
- have an employee conduct the survey, or
- use an external consultant or expert to collect the data.

Each method has its own advantages and disadvantages in terms of associated costs to the organization, rate of return, accuracy of results and protection of the privacy of the individual. As a rule, self-identification surveys are a straightforward way to collect such information. Employers should select the method that best suits the program goals and organizational culture.

Privacy and dignity should always be a concern in the collection of data. Organizations subject to freedom of information and privacy legislation should ensure that the identification method they choose complies with those laws.

Private sector employers should also collect data in a manner that respects dignity and privacy. For example, organizations can develop internal policies on privacy, or codes of ethics.

Participants should be advised how the information will be used. This assurance will help them feel more comfortable when asked to provide the information. Data collected in the context of a special program must be used for special program purposes only. For this reason, storage and access should be carefully controlled.

iii) Follow a Plan

A special program should contain the following elements:

Consultation

Appropriate steps should be taken to identify and consult with those who may be affected by the proposed special program.

Developing a Plan

The program provider should prepare a plan that includes the following information:

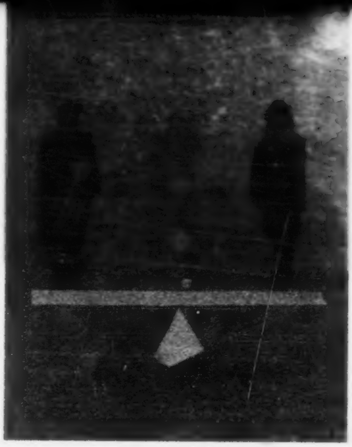
- an outline of how the special program will be implemented, including terms and conditions of the program;
- how long the program will run;
- special measures to be implemented; and
- goals, timetables and anticipated results.

Monitoring and Evaluation Mechanisms

The program should include a mechanism to monitor and evaluate the progress towards the desired results. It is important to:

- evaluate the effectiveness of the program;
- designate who, within the organization, is accountable for the program; and
- communicate program results to the organization and/or its client groups.

iv TERMS AND CONDITIONS OF EMPLOYMENT



part two | HIRING

Job qualifications should be the focus of recruitment and hiring policies. This is as true in the hiring process as it is in every aspect of the employment relationship. Therefore, it is advisable for employers to ask only those questions on application forms and interviews that relate to job requirements and qualifications, and not ask questions that may contravene the *Code*.

Throughout the entire hiring process, employers should be aware of bias or stereotypes that may lead to the elimination of candidates on the basis of grounds protected under the Code. The following list provides a few examples.

- **Not hiring someone due to a perceived lack of "career potential":** *This requirement tends to adversely impact on older applicants, especially where they are applying for "entry-level" type jobs.*
- **Refusing an applicant who has "too much experience" or who is "overqualified":** *Turning away candidates who are "overqualified" may sometimes have an adverse effect on newcomers to Canada who may have no choice but to apply to positions they may seem overqualified for in order to get "Canadian experience" or to "get their foot in the door".*
- **Eliminating an applicant because the applicant's background contains gaps:** *This can be a particular problem for older women who have re-entered the workforce after childrearing and have had to retrain.*

Section 23 of the *Code* provides some guidance on hiring practices that are encouraged and those that are prohibited. This provision is aimed at ensuring that job applicants are selected based on ability to do the job and not on assumptions or stereotypes based on personal characteristics such as race, sex, disability or other grounds of the *Code*.

a) Advertising

Job advertisements should not contain statements, qualifications or references that relate either directly or indirectly to race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, record of offences, age, marital status, same-sex partnership status, family status or disability.[96]

Some qualifications may not mention a ground of the *Code* directly, but may nonetheless unfairly prevent or discourage people from applying for a job. Advertisements for jobs that require "Canadian experience" or that indicate a preference for recent graduates are examples of "qualifications" that may be discriminatory barriers and result in human rights complaints. A requirement for Canadian experience may limit applications from recent immigrants and therefore result in discrimination on the basis of race, place of origin or ethnic origin. A preference for recent graduates may limit applications from older workers and result in discrimination on the basis of age.

The following checklist provides general guidelines that should be followed when preparing a job advertisement:

CHECKLIST:

- *Has non-discriminatory wording been used to describe the job?*
- *Are the essential duties of the job clearly explained?*
- *Has neutral language such as "sales clerk" rather than "salesman" been used wherever possible?*
- *Did you state that the employer is an equal opportunity employer?*

Employers should ensure that all the requirements or duties for employment are *bona fide*. For example, it is a *bona fide* requirement that a receptionist speak clear, intelligible English, but it is not acceptable to require "unaccented English". If it is essential that the person must drive for the job, the advertisement may state that a valid driver's licence (with the required class) is required.

There are exceptions under the *Code* that permit special programs in employment that would otherwise be discriminatory. For guidelines on such programs see the section entitled "Special Programs".

b) Employment Agencies/Search Firms

An employer cannot use an employment agency to hire people based on preferences related to race, sex, disability or other grounds of the *Code*. Employment agencies cannot screen applicants based on discriminatory grounds and are not allowed to keep a record of client "preferences" of this kind.[97] When using an employment agency or search firm, employers should ensure that the agency or firm is aware that they are an equal opportunity employer and wish to see a broad range of candidates.

c) Application Forms[98]

The *Code* prohibits the use of an employment application form or a "written or oral inquiry" that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination.[99] Application forms should not contain questions that ask directly or indirectly about race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, record of offences, age, marital status, same-sex partnership status, family status or disability.

Employment-related medical examinations, drug and alcohol testing, or related inquiries are not permitted at the application stage.

Although there are exceptions in the *Code* that allow for some questions that would otherwise be discriminatory, these only apply to the interview stage. Information regarding questions at the interview stage is provided in a separate section.

The following sections give more detailed information regarding application forms:

i) Age

It is permissible to ask whether the applicant is 18 years or over and under 65 years of age. There are no other permitted questions about age. Employers may even choose not to ask when schooling was completed as this may often indicate age.

Specifically, employers should not ask for:

- date of birth or birth certificate;
- other documents that indicate age, e.g., baptismal records, driver's licence

A driver's licence contains personal information that could lead to the applicant being classified according to age. Therefore, an application form should not include a request to provide a copy of a driver's licence. If driving is an essential requirement of the job, the employer should only request a copy of a driver's licence after a conditional offer of employment is made.

Where age or date of birth is relevant to company pension and benefit plans, this information should be collected only after making an offer of employment and should be kept confidential.

ii) Citizenship, Place of Origin or Ethnic Origin

It is permitted to ask, "Are you legally entitled to work in Canada?"

No other questions about these grounds are permitted. Also prohibited at the application stage are questions about:

- landed immigrant status, permanent residency, naturalization or refugee status;

- place of birth;
- Social Insurance Numbers, which may contain information about an applicant's place of origin or immigrant status. A Social Insurance Number may be requested after a candidate has received a conditional offer of employment;
- questions about which "community" a person belongs to;
- membership in organizations such as cultural or ethnic associations; or
- questions about the name and location of schools attended.

Information about a person's education at this stage should be limited to information about the degree or level of education, professional credentials, diplomas, *etc.* received. Asking applicants to provide the names of schools or copies of diplomas, certificates and professional credentials may indicate place of origin. Therefore, it is advisable that such information not be requested or collected until a conditional offer of employment has been made.

iii) Creed/Religion

There are no permissible questions related to religion or creed.

Prohibited questions at the application stage include those about:

- religious affiliations, churches, temples or other religious institutions attended;
- whether religious holidays are observed;
- whether particular religious customs are observed;
- willingness to work on a day of the week that is usually a Sabbath or other religious day of rest, such as Friday afternoons, Saturdays or Sundays;
- character references that would indicate religious affiliation, such as a request for references from a person's religious or spiritual leader; or
- questions about the name and location of schools attended.

Asking for the names of schools, diplomas, certificates and professional credentials may indicate religious affiliation.

If an employer is concerned about a person's availability for work because of shifts or other scheduling reasons, it is advisable to wait until a conditional offer of employment has been made before asking about how the applicant's religious needs may be met.

iv) Disability

There are no permissible questions about disabilities at the application stage, including those related to:

- general health and medical history;
- illnesses;
- mental disorders or illnesses;
- physical or intellectual limitations;
- developmental disabilities or intellectual impairment or learning disabilities;
- injuries
- Workplace Safety & Insurance claims;
- medication;
- membership in medical or patient associations (*e.g.*, Alcoholics Anonymous).
- predisposition to medical conditions;
- insurability or eligibility for benefit plans;
- substance abuse or treatment for substance abuse, or
- driver's licences.

A driver's licence contains personal information that could lead to the applicant being classified according to disability or another prohibited ground. Therefore, an application form should not include a request to provide a copy of a driver's licence or any questions about a person's eligibility for a driver's licence. If driving is an essential requirement of the job, the employer should only request a copy of a driver's licence after a conditional offer of employment is made.

No questions are permitted at this stage about accommodating disability-related needs or the nature and scope of such accommodation. Applicants are not required to undergo pre-employment medical examinations or drug and alcohol tests.

v) Family Status

No questions about family status are permitted. This includes questions about:

- whether a person has or may have children;
- whether a person has family responsibilities; or
- whether family responsibilities limit the applicant's availability.

Instead of asking whether an applicant's family responsibilities limit his or her availability, it is advisable to ask, where relevant to the job, if the applicant is free to travel or relocate.[100]

vi) Marital Status

No questions about marital status are permitted. This includes questions relating to:

- whether the candidate is single, married, separated, divorced, or living in a common-law/same-sex partnership relationship;
- the candidate's spouse (*e.g.*, "Is your spouse willing to transfer?");
- maiden or birth name,
- form of address (Mr., Mrs., Miss, Ms.); or
- relationship to the person to be notified in case of emergency or to the insurance beneficiary.

Instead of asking whether an applicant's spouse is willing to transfer, it is advisable to ask, where relevant to the job, if the applicant is free to travel or relocate.[101]

vii) Race, Colour and Ancestry

There are no permissible questions about race, colour or ancestry at the application stage.

Therefore, the following are prohibited:

- questions relating to physical characteristics such as eye colour, hair, height, and weight;
- requests for photographs; and
- questions about which "community" a person belongs to.

viii) Record of Offences

It is permissible to ask: "Have you ever been convicted of a criminal offence for which a pardon has not been granted?"

Prohibited questions are those about, or relating to, whether an applicant has ever:

- been convicted of any offence (this may elicit information on pardoned offences);
- spent time in jail;
- been convicted under a provincial statute (*e.g., Highway Traffic Act*); or
- been convicted of an offence for which a pardon has been granted.

ix) Sex and Pregnancy

There are no permissible questions in relation to sex and pregnancy.

Prohibited questions at the application stage include questions about:

- forms of address (*i.e.*, Mr., Mrs., Miss, Ms.);
- the last name before marriage (*i.e.*, maiden or birth name);
- the candidate's relationship to the person listed as an insurance beneficiary or to be notified in case of an emergency; or
- plans to start a family.

Instead of asking whether an applicant has or plans to have children, it is advisable to ask, where relevant to the job, if the applicant is free to travel or relocate.[102]

x) Sexual Orientation/Same-sex Partnership Status

No questions about sexual orientation or same-sex partnership status are permitted. This includes questions relating to:

- forms of address (*i.e.*, Mr., Mrs., Miss, Ms.);
- name of spouse or partner;
- categories on application forms or inquiries such as married, common-law relationship or divorced; or
- questions about a spouse/partner: "Is your spouse willing to transfer?"

Instead of asking whether an applicant's spouse is willing to transfer, it is advisable to ask, where relevant to the job, if the applicant is free to travel or relocate.[103]

d) Interviews

At the interview stage of the employment process, the employer may expand the scope of job-related questions to determine the applicant's qualifications or ability to perform the essential duties of the job.

If the applicant requests accommodation for needs such as those relating to a disability, religion or pregnancy, these needs may be discussed at the interview stage.[104] Otherwise, accommodation should only be discussed after a conditional offer of employment is made.[105] Employers should be prepared to accommodate applicants with disabilities who require accommodation during the hiring process.

At the interview stage, the employer has more flexibility to ask questions about prohibited areas of discrimination, provided that the questions relate to exceptions that are provided for in the *Code*.[106] These exceptions are related to special service organizations, special programs and jobs whose requirements are linked to specific grounds of the *Code*.

As well, employers may implement special programs designed to relieve hardship or economic disadvantage or to assist disadvantaged groups to achieve equal opportunity. Inquiries as to membership in a group experiencing hardship or disadvantage would be permissible.[107]

i) Age

Questions about age are allowed if the employer is a special service organization that serves a particular age group.[108] Special service organizations are defined as religious, philanthropic, educational, fraternal or social in nature, serving mostly the interests of certain age groups. It is permitted to hire persons based on their age provided that age is a reasonable and *bona fide* requirement of the job.

Example:

> *A youth group is hiring a social coordinator and the organization wishes to hire a person under 25 years of age. The organization may be able to do so, provided that it can show that this is a bona fide job requirement.*

Even if an employer is not considered to be a "special service organization", it can still discriminate by age if age is a reasonable and *bona fide* qualification because of the nature of the employment.[109]

No other questions or statements related to age are permissible. The following types of statements/ comments, while not exhaustive, would tend to indicate that age was a factor in the hiring process. Such statements may indicate discrimination on the basis of age and should always be avoided.

Examples:

- *Indications of qualifications that can reasonably be interpreted as a euphemism for age: e.g., "Do you think you can handle this job? It takes a person who is full of vim and vigour." "We are looking to rejuvenate the workforce."*
- *Comments on the applicant's appearance and/or health or suggesting that the applicant may not fit into a youthful work culture.*

ii) Citizenship, Place of Origin and Ethnic Origin

It is permissible to ask if a person is legally entitled to work in Canada.

Questions relating to citizenship are also permitted if citizenship requirement is imposed or authorized by law for the particular job.[110]

Questions about citizenship or permanent resident status are also allowed where a requirement of Canadian citizenship or permanent residence has been adopted in order to promote participation in cultural, educational, trade union or athletic activities to other citizens or permanent residents.[111]

Employers are entitled to ask questions about Canadian citizenship or residence where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions.[112]

Questions about "Canadian experience" sometimes pose particular problems for recent immigrants and may therefore create an adverse impact on persons based on their place of origin, citizenship or ethnic origin. Employers should try to ensure that candidates have trade or professional qualifications without requiring Canadian experience. Of course, if there is a legal requirement for citizenship, or other qualifications that have to be certified or acquired in this country, the law would have to be reasonable and non-discriminatory, failing which the *Code* would apply. In many instances, there are easy ways to assess a person's skills and abilities without having to contact a Canadian reference or insist on Canadian experience.

Example:

> *An employer is looking for a typist/receptionist. Even if the person received their training in another country, there are several options available to an employer to verify skills, including standard testing (typing tests, for example), letters of reference or probationary periods.*

Special service organizations that are religious, philanthropic, educational, fraternal or social in nature may employ only people from certain groups if the organization serves mostly their interests.[113] In these cases, it is permitted to hire persons based on place of origin or ethnic origin. This exception does not, however, extend to citizenship and is only permitted if membership in the ethnic group, or group identified by place of origin, is reasonable and *bona fide*.

iii) Creed/Religion

If the applicant requests accommodation for religious requirements, the accommodation needs may be discussed at the interview stage. Otherwise, religious needs should be discussed at the conditional offer stage.

Example:

> *An observant Muslim who applies for a job that requires the wearing of a uniform may request accommodation for her religious requirement of wearing a hijab (a head covering).*

Special service organizations that are religious, philanthropic, educational, fraternal or social in nature may prefer to employ persons of a particular religion if the organization serves mostly the interests of that group.[114] In such cases, it is permitted to hire persons based on religion provided that the requirement of belonging to a particular religion is reasonable and *bona fide* based on the nature of the employment.

Example:

> *A denominational school is hiring teachers and caretaking staff. Questions about religious membership would be permitted if the job involves communicating religious values to students. Therefore, such questions would be permitted with respect to the teachers, but probably not with respect to the caretaking staff.*

It should be noted that Roman Catholic schools enjoy constitutional rights and protections that are not affected by the *Code*.[115]

iv) Disability

Employers are obligated to offer candidates with disabilities accommodation of their needs if required for any part of the interview or test screening process. The Commission recommends that employers make such an offer to all candidates at the point of inviting candidates for an interview or test.

An employer may ask questions that are directly connected to the applicant's ability to perform the essential duties of the job and any accommodation required.

Where the applicant's disability becomes an issue at the interview, *e.g.*, where the applicant chooses to talk about his/her disability or the applicant's disability is obvious, an employer may make inquiries at the interview about the applicant's accommodation needs or the applicant's ability to perform the essential duties of the job. Questions should not be gratuitous, such as "How did you end up in a wheelchair?" or "Have you been blind all your life?" They should be asked with the aim of ascertaining the applicant's ability to perform essential duties.

Any questions beyond this scope should be made with great caution and vigilance as they may lead to a complaint on the ground of disability should the applicant not be successful. Additionally, if an employer fails to canvass possible accommodation measures where disability has become an issue at an interview, this also could potentially lead to a complaint on the ground of disability should the applicant not be successful.

Other disability issues should not be raised until a conditional offer of employment is made.

The essence of accommodating people who have disabilities is dignity and individualization. This means that each person must be considered individually in order to determine what changes can be made to accommodate his or her needs. There is no exact formula as to what form of accommodation is appropriate to alleviate the barriers confronting people with disabilities. Each person's needs are unique and must be considered individually when a barrier is encountered. A particular solution may meet one person's requirements but not another's. It is also the case that many accommodations will benefit large numbers of persons with disabilities. However, in all cases, the principle to apply is that of accommodation to the point of undue hardship. Often the cost of accommodation is, in fact, negligible.

A person who requires accommodation in order to perform the essential duties of a job has a responsibility to communicate her or his needs in sufficient detail and to cooperate in consultations to enable the person responsible for accommodation to respond to the request.

Questions about disability are allowed by religious, philanthropic, educational, fraternal or social organizations that serve persons with disabilities.[116] It is permitted to give preference to persons with disabilities provided that having a disability is a reasonable and *bona fide* requirement of the job.

Example:

> *A social service organization serving persons who are deaf, deafened or hearing impaired may prefer to hire a community liaison officer who has a hearing impairment.*

All other questions concerning the applicant's disability are prohibited. It should be noted that requests for a driver's licence number or a copy of the licence, where relevant to the job, should only be made following a conditional offer of employment.

v) Family Status

An employer may grant or withhold employment or advancement in employment to a person who is a child or parent of the employer or an employee.[117] Where an employer has a policy on this issue, inquiries as to whether an applicant is a child or parent of a current employee would be permissible.

vi) Marital Status

An employer may grant or withhold employment or advancement in employment to a person who is a spouse or same-sex partner of the employer or an employee.[118] Where an employer has a policy on this issue, inquiries as to whether an applicant is a spouse or same-sex partner of a current employee would be permissible.

Questions about marital status are allowed if the employer is a religious, philanthropic, educational, fraternal or social organization that serves a particular group of persons such as single, divorced or other persons identified by their marital status.[119] It is permitted to give preference to persons based on their marital status provided that this is a reasonable and *bona fide* requirement of the job.

In some instances, because of the nature of the employment, marital status may be a reasonable and bona fide qualification for the particular job. In such instances, inquiries about the particular qualification may be made at the employment interview stage.[120]

No other questions about marital status are permitted.

vii) Race, Ancestry and Colour

Questions about race, ancestry or colour are allowed if the employer is a religious, philanthropic, educational, fraternal or social organization that serves a particular group defined by the race, ancestry or colour of the persons served.[121] It is permitted to give preference to persons based on their race, ancestry or colour provided that a particular race, ancestry or colour is a reasonable and *bona fide* requirement of the job.

Example:

> *Recruiters for a social organization that primarily serves Aboriginal communities and seeks to hire an employment counsellor may prefer a person who is of Aboriginal ancestry. The organization may be able to do so, provided that it can show that this is a* bona fide *job requirement.*

Questions may be asked during an interview about language abilities, even if those requirements might be indirectly linked to a person's racial background, provided that the language abilities relate to a *bona fide* requirement of the job.

Example:

> *A financial institution is seeking to fill a customer service position for one of its branches located in an ethnically diverse area of the city. The position requires fluency in one or more of the languages used by the local population. Asking what languages the applicant speaks would be a* bona fide *job requirement.*

viii) Record of Offences

Questions to determine if an applicant is bondable, if being bondable is a reasonable and *bona fide* qualification of the job, are permitted.

Questions are permitted to determine if an applicant has a record of convictions under the *Highway Traffic Act*, if driving is an essential job duty (*e.g.*, bus driver).

All other questions, except those with respect to unpardoned *Criminal Code* convictions, are prohibited.

ix) Sex and Pregnancy

In some instances, because of the nature of the employment, being a man or a woman may be a reasonable and *bona fide* qualification for the particular job. In interviews, an employer can discuss this with the applicant.[122]

Organizations that are religious, philanthropic, educational, fraternal or social may prefer to employ only men or only women if the organization serves mostly their interests.[123] In such cases, it is permitted to give preference to persons based on sex provided that the requirement of being a man or a woman is reasonable and *bona fide* based on the nature of the employment.

At the interview stage of the employment process, the employer may expand the scope of job-related questions, if necessary, to determine the applicant's qualifications or ability to perform the essential duties. If the applicant requests accommodation, the accommodation needs may be discussed at the interview stage.

For example, a pregnant woman may have special needs linked to the health of her unborn child. However, the right to equal treatment in employment because of pregnancy prohibits pregnancy-related questions during a job interview. For example, an employer cannot ask an applicant whether she is pregnant or whether she has or plans on having a family, unless it relates to a reasonable and *bona fide* job requirement, and if the employer can show that persons with children cannot be accommodated without undue hardship.

x) Sexual Orientation/Same-sex Partnership Status

Questions about same-sex partnership status are allowed if the employer is a religious, philanthropic, educational, fraternal or social organization that serves a particular group of persons identified by their same-sex partnership status.[124] It is permitted to give preference to persons based on their same-sex partnership status provided that this is a reasonable and *bona fide* requirement based on the nature of the job.

In some instances, because of the nature of the employment, same-sex partnership status may be a reasonable and *bona fide* qualification for the particular job. In such instances, inquiries about the particular qualification may be made at the employment interview stage.[125]

No other questions about same-sex partnership status are permitted. Other than in the case of a special program, no questions about sexual orientation are permitted.

e) Conditional Job Offers

Asking for information or documentation that may include particulars in relation to a prohibited ground of discrimination may create a misapprehension of discrimination.

For example:

- *a driver's licence will contain information on date of birth;*
- *a work authorization issued by Immigration Canada will contain information regarding date of arrival in Canada;*
- *educational or professional credentials may reveal information regarding place of origin; and*
- *a Social Insurance Number card may contain information regarding date of arrival in Canada.*

It may therefore be appropriate in such circumstances to defer asking for this information until after making an offer of employment conditional on a satisfactory response.

Requests for medical examinations or health information necessary for pension, disability, superannuation, life insurance and benefit plans should also be made after acceptance of a (preferably written) conditional offer of employment.

f) Medical Tests

In the past, employers often screened out applicants with disabilities based on medical information requested on application forms or obtained through pre-employment medical examinations. The Commission takes the position that such questions, asked as part of the application screening process, violate subsection 23(2) of the *Code*.

Medical assessments to verify or determine an individual's ability to perform the essential duties of a job should only take place after a conditional offer of employment is made, preferably in writing. This allows an applicant with a disability the right to be considered exclusively on her or his merits during the selection process.

Information on medical tests may have an adverse impact on persons with a disability. Therefore, employers should only be provided with information from medical testing regarding the applicant's ability to perform the essential duties of the job and any restrictions that may limit this ability. It is an applicant's responsibility to communicate sufficient information to allow the employer to attempt accommodation.

The Commission recognizes the fact that it would be advantageous to both the employer and prospective job applicants if the employer were to disclose information on any specific medically related requirements of a position at an early stage of the recruitment process.

However, the employer may be placed in a vulnerable position if he or she directly receives any information about an applicant's medical condition. This information leaves open the possibility for an allegation to be made that subsequent decisions made by the employer, such as the hiring of another applicant or the promotion or termination of an employee, were based on that information.

Therefore, it is the view of the Commission that to protect the employer from allegations of discrimination, as well as the applicant or employee from discriminatory practices, medical information should remain with the examining physician and away from an employee's personnel file. When required by the employer, the physician can communicate relevant information, *e.g.*, restrictions in the ability to perform essential duties, while excluding information that may identify a disability.

Where an employer decides to implement medical testing, the following checklist sets out the employer's obligations.

1. ***Have job applicants been notified of testing prior to employment?***

   Where medical testing is appropriate, the employer should notify job applicants of this requirement at the time an offer of employment is made. The circumstances under which such testing might be required should be made clear to the applicant.

2. ***Is there an objective basis for testing?***

   The employer should ensure that the medical testing is necessary and appropriate. In order to discern the necessity for testing, employers, where applicable, should consider the following questions, among others:

   a. *Is the testing justified objectively in relation to job performance? i.e., is there a rational connection between testing and job performance?*
   b. *Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by the disability will adversely affect the safety of co-workers or members of the public?*

3. ***Have arrangements been made for competent handling of test samples?***

   Medical testing must be performed by qualified professionals and the results analyzed in a competent laboratory. Further, it is the responsibility of the employer to ensure that the samples taken are properly labelled and protected at all times.

4. ***Have the results of the test been reviewed with the employee?***

   Procedures should be instituted for the physician to review the test results with the employee concerned.

5. ***Are the test results kept confidential?***

   In order to protect the confidentiality of test results, all health assessment information should remain exclusively with the examining physician and away from the employee's personnel file.

g) Psychometric and Psychological Testing

Employers sometimes use tests that assess psychological or personality profiles of job applicants. The use of these and other behaviour profiles as part of a hiring process may raise human rights issues. Subsection 23(2) of the *Code* prohibits the use of an employment application form or a written or oral inquiry that directly or indirectly classifies an applicant on the basis of a prohibited ground of discrimination. This also applies to psychological profiles and testing.

The validity of behavioural testing as a predictive tool may be subject to a complaint under the *Code*. Any test should be a reasonable and *bona fide* method of assessing an applicant's ability to do the job. Otherwise it should not be used.

There are two significant issues concerning the use of behavioural profiles. The first issue is whether the use of such a screening tool directly discriminates based on any of the grounds in the *Code*. Direct discrimination could occur if the behavioural profile test directly identifies or classifies an applicant on the basis of a prohibited ground of discrimination. A test, for example, that asks about a person's religious beliefs, is directly discriminatory and is not permissible.

The second issue concerns reasonable and *bona fide* behaviour profiles that might infringe the *Code* if they exclude a group of persons who are identified by a prohibited ground - for example, if members of certain ethnic groups are inadvertently yet consistently screened out as a result of a test which favours other cultures. There is an obligation to accommodate the needs of the group of which the person is a member to the point of undue hardship, taking into consideration the cost, outside sources of funding and any health and safety requirements.

> *Care should be taken with testing that seeks to assess personal interests, attitudes and values. Employers may wish to consider how tests are constructed with a view to assessing reliability, validity and whether tests conform to established guidelines and practices as may be promulgated by professional organizations such as the Canadian Psychological Association.*

h) Pre-Employment Drug and Alcohol Testing

It is a legitimate goal for employers to have a safe workplace. One method sometimes used by employers to achieve that goal is drug and alcohol testing. However, such testing is controversial and, especially in the area of drug testing, of limited effectiveness as an indicator of impairment. It is not used to a significant degree anywhere in the world except in the United States.

i) Drug or Alcohol Dependency as a Disability

Under the *Code*, drug and alcohol dependencies – as well as perceived dependencies – are a form of disability within the meaning of the *Code*. Persons with disabilities, or persons who have had disabilities, are protected against discrimination in the workplace.

Examples:

> *An employer refuses to promote a particular employee because of the perception that the employee has an alcohol dependency. As a result of this perception and consequent action on the part of the employer, the individual's right to equal treatment under the* Code *may have been infringed.*
>
> *An individual who has had a drug or alcohol dependency in the past, but who no longer suffers from an ongoing disability, is still protected by the* Code.

ii) Basic Principles

Drug and alcohol testing is *prima facie* discriminatory under Canadian human rights law. Employers can nevertheless justify discriminatory rules if they can meet the three-part test discussed earlier under "Designing a Job - *Bona Fide* Occupational Requirements".

Applying the three-part test to drug and alcohol testing, the following questions should be considered by employers, where applicable:

1. Is there an objective basis for believing that job performance would be impaired by drug or alcohol dependency? In other words, is there a rational connection between testing and job performance?
2. In respect of a specific employee, is there an objective basis for believing that unscheduled or recurring absences from work, or habitual lateness to work, or inappropriate or erratic behaviour at work are related to alcoholism or drug addiction/dependency? These factors could demonstrate a basis for "for cause" or "post incident" testing provided there is a reasonable basis for the conclusions drawn.
3. Is there an objective basis to believe that the degree, nature, scope and probability of risk caused by alcohol or drug abuse or dependency will adversely affect the safety of co-workers or members of the public?

Drug and alcohol testing that has no demonstrable relationship to job safety and performance has been found to be a violation of employee rights. A relationship or rational connection between drug or alcohol testing and job performance is an important component of any lawful drug or alcohol testing policy. In this regard, the policy must not be arbitrary in terms of which groups of employees are subject to testing.

Example:

> *An employer operating a shipping company only tests new or returning employees for alcohol but not other employees. This would not be justifiable. At the same time, testing employees in safety sensitive positions only, i.e., truck drivers and fork-lift operators, may be justifiable.*

iii) Pre-Employment Testing As Part of An Employment Related Medical Examination

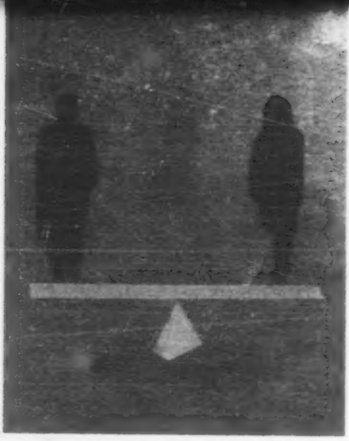
Testing for alcohol or drug use is a form of medical examination. The following are the main principles that should be kept in mind:

1. Employment-related medical examinations or inquiries, conducted as part of the applicant screening process, are prohibited.
2. Pre-employment medical examinations or inquiries at the interview stage should be limited to determining an individual's ability to perform the essential duties of a job.
3. In order to implement a testing program prior to hiring, the employer must be able to demonstrate that pre-employment testing provides an effective assessment of the applicant. Since drug testing cannot be shown to actually measure impairment, pre-employment drug testing should not be conducted. Although there has been no clear indication from the courts, it is the Commission's view that, in the absence of clear medical research, pre-employment alcohol testing does not appear to predict an employee's ability to perform the essential requirements of a safety-sensitive position. All it can do is assess impairment before the person is actually on the job. It is therefore difficult to see how an employer could justify pre-employment alcohol/drug testing.
4. Medical examinations to determine an individual's ability to perform the essential duties of a job should only be administered after a conditional offer of employment has been made, preferably in writing.
5. Where drug or alcohol testing will be a valid requirement on the job, the employer should notify job applicants of the requirement at the time that an offer of employment is made. The circumstances under which such testing might be required should be made clear to the applicant.
6. If the applicant or employee requests accommodation in order to enable him or her to perform the essential duties of the job, the employer is required to provide individual accommodation unless it is impossible to do so without causing undue hardship.

iv) On-The-Job Testing

While pre-employment drug and alcohol testing is not permitted, such testing may be justifiable on the job in safety sensitive positions only. For the requirements surrounding on-the-job drug and alcohol testing and the employer's duty to accommodate following a positive test, see the section "On The Job - Drug and Alcohol Testing".

iv TERMS AND CONDITIONS OF EMPLOYMENT



a) Confidentiality

An employer or service provider who legitimately requires and collects personal information that either directly or indirectly identifies an individual by one of the prohibited grounds of discrimination listed in the *Code* must ensure the maximum degree of privacy and confidentiality of the information. This applies in all situations and circumstances including employment records and files, insurance company records, medical information, *etc.* The information might be required to enable an employee or individual to claim or register for benefits, pensions or for other purposes. All information should remain exclusively with designated personnel (such as the human resources person) in a secure filing system in order to protect the individual's confidentiality.

For example, documentation that requires employees to identify next-of-kin, or a beneficiary for insurance purposes or benefits claims forms, may contain information that identifies employees by sexual orientation. If this information is not treated confidentially, employees who are gay, lesbian or bisexual, or who are in a same-sex partnership may feel vulnerable to subtle or overt discrimination or harassment.

Similarly, employees making accommodation requests may legitimately be concerned that details regarding, for example, their creed, disability or pregnancy will be revealed.

EXAMPLE:

An employee with AIDS has provided documentation to demonstrate her need for a flexible schedule and rest periods to manage periods of fatigue as well as time to attend appointments with health care professionals. However, it is not necessary for the employee to disclose that she has AIDS. The employer is entitled to know that the employee has a disability and that she needs certain accommodations in order to remain productive at work.

Maintaining confidentiality for individuals with mental illness may be especially important because of the strong social stigmas and stereotyping that still persist about such disabilities.

Documentation supporting the need for particular accommodation (flexible hours, a particular technical aid, for example) should be provided only to those who need to be aware of the information. It may be preferable, in some circumstances, for information to be provided to the company's health department or human resources staff rather than directly to the supervisor, so as to further protect confidentiality. Medical documentation should be kept separate from the person's corporate file.

An employer or service provider who fails to properly safeguard the personal information about an employee may infringe the *Code*. A complaint can be made where this results in a person being subjected to discrimination and/or harassment.

Practice Tips:

- **Information Required for Benefit Plans:** Only information that an employer really needs should be collected. While benefit information regarding an employee would likely include age, sex, marital status, family status, *etc.*, it would be unlikely that an employer would need to collect information regarding an employee's race, religion, ethnic origin or sexual orientation.
- **Information Required by Other Legislation:** Information relating to an employee's religion, disabilities or sexual orientation may be necessary in some circumstances. For example, information related to *Code* grounds may be required for enrolment in employer pension and benefit plans. The *Code* requires employers to accommodate an employee's needs around prohibited grounds of discrimination.[111] Therefore, in order to accommodate special employee needs relating to religious beliefs or disabilities, an employer would need to collect and use that data. However, disclosure of such information for any purpose not related to such accommodation or benefits would not be permitted.
- **Disclosure of Information to Third Parties:** Information may be disclosed to the government agency that required the collection of the information. Examples of this would be Canada Customs and Revenue Agency, or the Employment Standards Branch of the Ministry of Labour. All of the above agencies administer legislation that requires employers to collect and retain various types of information, permits the agencies to request information and requires employers to provide such information on an inspection or audit.
- **Separating Employee Records:** Only information that the agency requires should be disclosed. For example, the Canada Customs and Revenue Agency would not need information about an employee's race, disabilities or sexual orientation. In other words, do not just provide a general employee file that might include information about the grounds set out in the *Code*. Instead, store data in a form that permits retrieval and disclosure of only those portions that would be required.

b) Meeting the Needs of Employees

The *Code* requires an effort, short of undue hardship, to accommodate the needs of persons who are protected by the *Code*. It would be unfair to exclude someone from the workplace or activities in the workplace because their *Code*-protected needs are different from the majority. The principle of accommodation applies to all grounds of the *Code*, but certain grounds and issues arise frequently in the area of employment, notably:

- employees with disabilities
- older workers
- employees with religious needs
- pregnant women
- employees with family responsibilities

This section will first discuss the principle of accommodation, duties and responsibilities in the accommodation process, and the limits of the duty to accommodate. Then specifics will be outlined relating to the particular grounds of discrimination set out above.

i) The Principle of Accommodation

The right to be accommodated and the corresponding duty of the employer and union are now well-established in statute and case law.

> *Accommodation is a fundamental and integral part of the right to equal treatment.*

The *Code* recognizes that an employer may have operating rules, policies and procedures that may be necessary for business reasons, established under terms and conditions of a collective agreement or required to meet legal requirements such as health and safety legislation. However, the duty to accommodate means that the terms and conditions of the workplace or the functions of a job may have to be changed.

The principle of accommodation involves three factors: dignity, individualization and inclusion.[112]

- **Dignity:** Persons must be accommodated in a manner that most respects their dignity, including their privacy, confidentiality, comfort and autonomy.

- **Individualization:** There is no set formula for accommodation. Each person's needs are unique and must be considered afresh when an accommodation request is made. A solution may meet one person's requirements but not another's, although many accommodations will benefit large numbers of persons' similar needs.
- **Inclusion:** Achieving integration and full participation requires barrier-free and inclusive designs[133] and removal of existing barriers. Preventing and removing barriers means all persons should be able to access their environment and face the same duties and requirements with dignity and without impediment.

Accommodation may take one of two forms. It may involve meeting the needs of someone based on the needs of the group to which he or she belongs.[134] Alternatively, it may involve meeting the needs of a person (such as a person who has disabilities) assessed on an individual basis.[135]

Accommodation may be possible by modifying the terms and conditions of employment or by making adjustments in the workplace. For example, in a job where driving is an essential duty, an employer can accommodate an applicant with a disability by modifying a company car to meet the applicant's individualized needs unless doing so would cause undue hardship.

Accommodation may range from modifications that completely respect an individual's right to privacy, autonomy and dignity on one end of the spectrum, to those that least respect them on the other end of the spectrum. Accommodations that do not respect the individual's privacy, autonomy and dignity are not acceptable.

A one-time expenditure for some forms of accommodation may be too onerous on a particular employer. Therefore, in certain situations, accommodation may be provided on an interim basis or may be phased-in, providing the timeframe is reasonable. This approach could protect the employer from potential complaints that it failed to accommodate. However, the appropriateness of an interim or phased-in accommodation depends on an undue hardship analysis of the particular case.

Finally, collective agreements or other contractual arrangements cannot act as a bar to providing accommodation. The courts have determined that collective agreements and contracts must give way to the requirements of human rights law. To allow otherwise would be to permit the parties to contract out of their *Code* rights under the auspices of a private agreement. Accordingly, subject to the undue hardship standard, the terms of a collective agreement or other contractual arrangement cannot justify discrimination that is prohibited by the *Code*.

Employers and unions have a joint responsibility to find a solution when accommodation conflicts with the collective agreement. The Supreme Court of Canada has noted, however, that although the principle of equal liability applies, the employer has charge of the workplace and is in a better position to formulate measures of accommodation.[136] Therefore, the employer can be expected to initiate the process of accommodating an employee. However, the Supreme Court also noted that it will not absolve a union of its duty if the union fails to suggest available alternatives. When the union and the employer discriminate, they share an obligation to remove or alleviate the source of discrimination.

If an employer and a union cannot reach an agreement on how to resolve an accommodation issue, the employer must make the accommodation in spite of the collective agreement, unless it would cause undue hardship. If the union opposes the accommodation, or does not cooperate in the accommodation process, then the union may be named as a respondent in a complaint filed with the Commission.

Unions have to meet the same requirements of demonstrating undue hardship. For example, if the disruption to a collective agreement can be shown to create direct financial costs, this can be taken into account under the cost standard. Issues surrounding terms of a collective agreement relating to health or safety are dealt with under the section dealing with Health and Safety.

Duties and Responsibilities[137]

Employees, employers and unions have corresponding duties and responsibilities during accommodation which are summarized below.

Employees:

- request accommodation;
- explain why accommodation is required, so that needs are known;
- make his or her needs known to the best of his or her ability, preferably in writing;

- answer questions or provide information regarding relevant restrictions or limitations, including information from health care professionals, where appropriate, and as needed;
- participate in discussions regarding possible accommodation solutions;
- cooperate with any experts whose assistance is required;
- meet agreed-upon performance and job standards once accommodation is provided;
- work with the employer on an ongoing basis to manage the accommodation process; and
- discuss his or her accommodation needs only with persons who need to know. This may include the supervisor, a union representative or human rights staff.

Employers:

- accept the employee's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise;
- obtain expert opinion or advice where needed;
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions as part of the duty to accommodate;
- keep a record of the accommodation request and action taken;
- maintain confidentiality;
- limit requests for information to those reasonably related to the nature of the limitation or restriction so as to be able to respond to the accommodation request;
- grant accommodation requests in a timely manner, to the point of undue hardship, even when the request for accommodation does not use any specific formal language;
- bear the cost of any required medical information or documentation. For example, doctors' notes and letters setting out accommodation needs should be paid for by the employer; and
- where accommodation would cause undue hardship, explain this clearly to the employee and be prepared to demonstrate why this is the case.

Unions:

- take an active role as partners in the accommodation process;
- share joint responsibility with the employer to facilitate accommodation, including taking an active role in suggesting and testing alternative approaches and cooperating fully when solutions are proposed;
- respect the confidentiality of the person requesting accommodation; and
- support accommodation measures irrespective of collective agreements, unless to do so would create undue hardship.

Undue Hardship

The employer's duty to accommodate exists short of undue hardship. In order to claim the undue hardship defence, the employer has the onus of proof. It is not up to the person requesting accommodation to prove that the accommodation can be accomplished without undue hardship. The nature of the evidence required to prove undue hardship must be objective, real, direct, and, in the case of cost, quantifiable. The employer must provide facts, figures and scientific data or opinion to support a claim that the proposed accommodation in fact causes undue hardship. A mere statement, without supporting evidence, that the cost or risk is "too high" based on impressionistic views or stereotypes will not be sufficient.

The *Code* sets out only three items that may be considered in assessing whether an accommodation would cause undue hardship. These are:

- cost;
- outside sources of funding, if any; and
- health and safety requirements, if any.

This means that the employer must present evidence showing that the financial cost of the accommodation (even with outside sources of funding) or health and safety risks would create undue hardship for the employer.

Factors that are excluded from consideration, and cannot be used to justify undue hardship include business inconvenience, employee morale and customer preference. Collective agreements cannot act as an automatic bar to accommodation requests.

Only existing circumstances may be taken into account when considering undue hardship. Speculative risks and conditions that may arise in the future are not considered. For example, when a person with a disability has a condition that may deteriorate over time, the unpredictability and extent of future disability cannot be used as a basis for assessing present needs for accommodation. A person with multiple sclerosis may, over time, become more easily tired — but it is not possible to accurately predict when, for how long, or in what way this will occur.

Cost of Providing Accommodation

An employer can demonstrate that the costs of accommodation will cause undue hardship.

Costs will amount to undue hardship if they are:

- quantifiable;
- shown to be related to the accommodation; and
- so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.

Quantifiable costs related to accommodation include all projected costs that can be quantified and shown to be related to the proposed accommodation. However, mere speculation, for example, about monetary losses that may follow the accommodation of the person will not generally be acceptable. The financial costs of the accommodation may include:

- capital costs such as the installation of a ramp or the purchase of screen magnification software;
- operating costs such as sign language interpreters, personal attendants or additional staff time;
- costs incurred as a result of restructuring that are necessitated by the accommodation; and
- any other quantifiable costs incurred directly as a result of the accommodation.

The availability of outside sources of funding and other business considerations and practices that may alleviate any accommodation costs must first be considered.

Outside sources of funding include grants, subsidies or loans from government and non-government sources to improve building accessibility, tax credits or tax incentives for making such changes, grants and services available directly to the person with disabilities.

Business considerations/practices include:

- The size of the organization — what might prove to be a cost amounting to undue hardship for a small employer will not likely be one for a large employer.
- Can the costs be recovered in the normal course of business?
- Can other divisions, plants, *etc.* of the business help to absorb part of the costs?
- Can the costs be phased in — so much per year or financed through loans?
- Can the employer set aside a certain percentage of money per year to be placed in a reserve fund to be used for accommodation issues?

Note: Both phasing in and the establishment of a reserve fund are to be considered only after the person responsible for accommodation has demonstrated that the most appropriate accommodation could not be accomplished immediately.

Health and Safety Risks

Health and safety requirements may be established by law, regulation, rule, practice or procedure. They could also be established by the company itself or in conjunction with other companies in the same or similar kinds of business. Where a health and safety requirement creates a barrier for a person identified by a *Code* ground, the employer should assess whether the requirement can be waived or modified.[138]

Modifying or waiving the health and safety requirement may create risks that have to be weighed against the employee's right to equality. Where the risk that remains after accommodation is so significant as to outweigh the benefits of enhancing equality, it will be considered to create undue hardship.

An employer can determine whether modifying or waiving a health or safety requirement creates a significant risk by considering the following:

- Is the employee willing to assume the risk in circumstances where the risk is solely to his or her own health or safety?[139]
- Would changing or waiving the requirement be reasonably likely to result in a serious risk to the health or safety of other individuals?[140]
- What other types of risks are assumed within the enterprise?

- What types of risks are tolerated within society as a whole, reflected in legislated standards such as licensing standards, or in similar types of enterprises?

Risk to an Employee's Own Health and Safety

An employer may believe that accommodation that would result in the modification or waiver of a health or safety requirement could place the individual at risk. The employer is obliged to explain the potential risk to the employee. The employee is usually the person who is best able to assess the risk. This applies only if the potential risk is to the employee's health or safety alone. Where the risk that remains after considering alternatives and after accommodation is so significant as to outweigh the benefits of enhancing equality, it will be considered to be undue hardship.

Risk to Health and Safety of Others

Where modification or waiver of a health or safety requirement is believed to result in a risk to the health or safety of others, the degree of risk must be evaluated. The employer must consider other types of risks assumed within the company. A potential risk created by accommodation should be assessed in light of those other more common sources of risk in the workplace.

The seriousness of the risk is to be judged based on taking suitable precautions to reduce it. In evaluating the seriousness of risk, the following factors may be considered:

- *The nature of the risk: What could happen that would be harmful?*
- *The severity of the risk: How serious would the harm be if it occurred?*
- *The probability of the risk: How likely is it that the potential harm will actually occur? Is it a real risk, or merely hypothetical or speculative? Could it occur frequently?*
- *The scope of the risk: Who will be affected by the event if it occurs?*

If the potential harm is minor and not very likely to occur, the risk should not be considered serious. If there is a risk to public safety, consideration will be given to the increased numbers of people potentially affected and the likelihood that the harmful event may occur.

ii) Employees with Disabilities[141]

Discrimination based on disability or perceived disability is prohibited in employment. The *Code* guarantees equal treatment to a person with a disability who is able to perform the essential duties of a job with accommodation to the point of undue hardship.[142] Where a person is unable to perform the essential duties, even with accommodation, or where accommodation would amount to undue hardship, a decision not to employ the person would not be discriminatory. Once the employer is aware of employee needs, he or she must take steps to meet the duty to accommodate.

Ability to Perform Essential Duties

The first step is to separate essential from non-essential duties of the job. If the person is unable to carry out the non-essential duties of the job, he or she must be accommodated to do so, or these duties must be re-assigned. Accommodation must be provided to enable a person with a disability to perform the essential duties of the job, to the point of undue hardship.

Conclusions about inability to perform essential duties should not be reached without actually testing the ability of the person. It is not enough for the employer or person to assume that the person cannot perform an essential requirement. Rather, there must be an objective determination of that fact.

Example:

> *An employee who works in a copy shop has limited arm movement due to a shoulder injury. The employee is required to operate the copying equipment in order to fill customers' orders. Various types of copy paper are delivered by truck every week and need to be stacked and stored after delivery. Operating the copy equipment to fill orders would be an essential duty. Lifting, stacking and storing the weekly paper order is less likely to be an essential duty, since the paper delivery could be moved to a different time in the week and/or the stacking duties could be assigned to a co-worker.*

If essential duties cannot be performed in alternative ways, the employer must explore other accommodation resources that may enable the person to perform the essential duties. This accommodation may include an adjustment of the performance standard so long as doing so does not result in undue hardship.

Non-Evident Disabilities

The duty to accommodate a disability exists for needs that are known. Organizations and persons responsible for accommodation are not, as a rule, expected to accommodate disabilities of which they are unaware. However, some individuals may be unable to disclose or communicate their needs because of the nature of their disability. In such circumstances, employers should attempt to assist a person who is clearly unwell or perceived to have a disability, by offering assistance and accommodation. On the other hand, employers are not expected to diagnose illness or "second-guess" the health status of an employee.

Example:

> *An employer is unaware of an employee's drug addiction but perceives that a disability might exist. The employer sees that the employee is having difficulty performing, and is showing signs of distress. If the employer imposes serious sanctions or terminates the employee for poor performance, without any progressive performance management and attempts to accommodate, these actions may be found to have violated the* Code.

Return to Work

People who return to work after an absence related to a ground in the *Code* are protected by the *Code.*[143] They generally have the right to return to their jobs or a similar job. Both employers and unions must cooperate in accommodating employees who are returning to work. Accommodation is a fundamental and integral part of the right to equal treatment in the return to work context. Occupational Health and Safety committees, which include representatives of both management and labour, can be helpful in working out individual accommodations for injured workers.

The right to return to work for persons with disabilities only exists if the worker can fulfil the essential duties of the job after accommodation short of undue hardship.[144] If a person cannot fulfil the essential duties of the job, despite the employer's effort to accommodate short of undue hardship, there is no right to return to work.

With respect to leave, there is no fixed rule as to how long a disabled employee may be absent before the duty to accommodate has been met. This depends on the ability of the employee to perform the essential duties of the job, considering the unique circumstances of every absence and the nature of the employee's condition. Also important are the predictability of absence, both in regards to when it will end and if it may recur, and the frequency of the absence. The employee's prognosis and length of absence are also important considerations. It is more likely that the duty to accommodate will continue with a better prognosis, regardless of the length of absence.

The duty to accommodate does not necessarily guarantee a limitless right to return to work. On the other hand, a return to work program that relies on arbitrarily selected cut-offs or requires an inflexible date of return may be challenged as a violation of the *Code*.

As noted in the following section, there may also be a right to alternative work.

Alternative Work

The term "alternative work" means different work or work that does not necessarily involve similar skills, responsibilities and compensation. Although accommodation in the pre-disability job is always preferable, it may not always be possible.
The Commission has taken the position that accommodation in a job other than the pre-disability job may be appropriate in some circumstances.

The following checklist provides questions that should be considered:

CHECKLIST:

- *Is alternative work possible and available at present or in the near future?*
- *If it is not available, can a new position be created without causing undue hardship?*
- *Does it require additional training and does the training impose undue hardship?*
- *Does the alternative work policy contravene the collective agreement?*
- *What are the terms of the collective agreement or individual contract of employment? What are the past practices of the workplace?*
- *How interchangeable are workers? Do employees frequently change positions either permanently or temporarily for reasons other than disability accommodation?*

Alternative work may be either temporary or permanent:

- *Temporary Alternative Work:* Temporary alternative work may be appropriate either in a return to work context or where a disability leaves an employee temporarily unable to perform the pre-disability job. Temporary alternative work can also be an appropriate accommodation where the nature of the employee's disability and its limitations are temporary or episodic.
- *Permanent Alternative Work:* As outlined above, permanent assignment to alternative work may be appropriate in some circumstances. Reassignment to a vacant position should be considered an appropriate accommodation only when accommodation in the current position would cause undue hardship. The vacant position must be vacant within a reasonable amount of time but the employer is not required to "promote" the employee. If reassignment creates a conflict because of a collective agreement, accommodation needs should prevail over the collective agreement. When reassignment takes place, the person must be qualified for the reassigned position. The vacant position must be equivalent to the current position. If no equivalent one exists, a lower position would be acceptable. Reassignment is not available to job applicants.

iii) Older Workers[145]

Older workers may require accommodation for reasons such as disability and leave related to family, marital and/or same-sex partnership status (*e.g.*, the need to care for a family member, or an ailing spouse or same-sex partner). See the earlier sections "Principles and Concepts - Disability, Family Status, Marital Status, and Sexual Orientation and Same-Sex Partnership Status"; "Terms and Conditions of Employment - Inclusive Design and On the Job - Employees with Disabilities".

These obligations exist regardless of the age of the employee. However, due to a relationship between age and disability, these needs may become more apparent as workers and members of their family age.

Accommodation of older workers also requires individualized assessment to meet the changing needs and capacities of older workers.

Example:

> *An older worker finds a physically demanding task challenging. The employer should either assign it to someone else if it is not one of the essential duties of the position, or, if it is an essential duty, seek other ways in which to accommodate the worker to the point of undue hardship.*

There is also the need to examine the transition towards retirement. Traditionally, workforce participation has been seen as an "all or nothing" proposition; people either work full-time or are retired. However, moving from full-time work spanning a lifetime to the complete absence of work is a major change carrying with it social, psychological and financial implications. In order to facilitate the transition from employment to retirement and to encourage older workers to remain in the workforce longer, there is currently a trend towards more flexibility and phased-in retirement. Therefore, employers may want to consider measures such as flexible hours, or part-time arrangements.

iv) Employees with Religious Needs

The *Code* protects religious beliefs, practices or observances, even if they are not essential elements of the creed, provided they are sincerely held. Discrimination on the ground of creed includes any distinction, exclusion, restriction or preference based on religion or belief.

A person's religious beliefs may conflict with an on-the-job requirement, qualification or practice. Accommodation may mean modifying a rule or making an exception to all or part of it for the person concerned. The employer may be required to accommodate an employee's religious needs when workplace rules or practices have an adverse impact or create conditions that the employee cannot comply with.

EXAMPLE:

A workplace prefers to employ men with short hair. However, certain creeds do not permit men to cut their hair. The workplace would therefore be acting in a discriminatory manner unless it falls under a legal exception under the Code. It should be noted that where the nature of the job raises valid health and safety concerns, an employer may ask employees to contain their hair with a net or other appropriate head covering.

Dress Codes

Workplaces frequently have rules about dress. These may take the form of having to wear a particular uniform, having to wear protective gear or a requirement that no person should wear a head covering. When these rules conflict with religious dress requirements, there is a duty to accommodate the person, short of undue hardship.

Example

> *An employer requires counter staff to wear a uniform that includes a hat. A Muslim employee covers her head with a scarf because of her religious beliefs. The employer has a duty to accommodate the employee and to let her wear the head covering instead of the uniform hat.*

When dealing with dress codes, employers should consider the following:

- the exact nature of the religious observance;
- the reason for the uniform or dress code;
- the measures, including alternatives, that can be taken to accommodate the person; and
- health or safety hazards for either the person seeking the accommodation or for other employees, and the possibility that such hazards would constitute undue hardship for the employer.

As a rule, work uniforms imposed without a health or safety rationale should be modified to permit the person concerned to wear the items of clothing required by his or her religion. Although some types of clothing constitute a reasonable occupational necessity, the employer, subject to the limit of undue hardship, is obliged to accommodate. For example, an employer should try to modify the required apparel so that the person can wear religious items safely.

Break Policies

Some religions require daily periods of prayer. When this conflicts with the employer's regular work hours or daily routines, an employer has a duty to accommodate the needs, short of undue hardship. These might include modifying the policy regarding breaks, offering flexible hours, and/or providing a private area for prayer.

Holy Days and Religious Leave

In 1994, the Supreme Court of Canada articulated a number of general principles regarding religious leave. Work schedules may discriminate against some employees on the basis of creed, in that while some employees have their religious holy days (such as Christmas and Easter) recognized as holidays from work, others do not. Where employees have religious holy days that conflict with the standard work schedule, the employer has a duty to consider and grant requests for religious leave, including paid religious leave, unless to do so will cause undue hardship.[146] The employer is required to produce evidence to support a claim of undue hardship where time off is denied.

Flexible Scheduling

The purpose of this measure is to allow a flexible work schedule for employees, or to allow for substitution or rescheduling of days when an employee's religious beliefs do not permit him or her to work certain hours. Employers can satisfy their duty to accommodate the religious requirements of employees by providing appropriate scheduling changes and, in some instances, scheduling changes may provide the fairest and most reasonable form of accommodation.[147]

Example:

> *Seventh Day Adventists and members of the Jewish faith observe a Sabbath from sundown Friday to sundown Saturday. Observant members of these religions cannot work at these times. The employer introduces flexible scheduling to accommodate those employees.*

Flexible scheduling may include:

- alternative arrival and departure times on the days when the person cannot work for the entire period;
- use of lunch times in exchange for early departure or staggered work hours; and
- where the person has already used up paid holy days to which he or she is entitled, the employer should also consider permitting the employee to make up time lost, use floating days off or use other flexible work arrangements.

Rescheduling and the Employment Standards Act

In some workplaces, rescheduling is a practicable accommodation measure. Under the *Employment Standards Act*, an employer and an employee may agree that the employee will work on a public holiday. If a person seeks accommodation and if the provisions of the *Employment Standards Act* present an alternative, rescheduling would constitute an acceptable form of accommodation.

v) Accommodating the Needs of Pregnant Women[148]

The *Code* prohibits discrimination because of sex. Subsection 10(2) of the *Code* establishes that the right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is, was or may become pregnant or because she has had a baby. "Pregnancy" therefore includes the process of pregnancy from conception up to the period following childbirth and includes the post-delivery period and breastfeeding. The term "pregnancy" takes into account all of the special needs and circumstances of a pregnant woman and recognizes that the experiences of women will differ.

Special needs can be related to circumstances arising from:

- miscarriage;
- abortion;
- complications because of pregnancy or childbirth;
- conditions which result directly or indirectly from an abortion/miscarriage;
- recovery from childbirth; or
- breastfeeding.

Pregnancy and Bona Fide *Occupational Requirements*

Differential treatment of a woman because she is or may become pregnant may be legitimate if it can be demonstrated that not being pregnant is a *bona fide* occupational requirement.[149]

Examples:

> *A woman who was seven months pregnant was denied a position as kitchen help in a restaurant. The human rights tribunal heard evidence that the position would be physically demanding. As the woman had never performed these kitchen duties before, she would not know the extent of the physical requirements expected for this job. The tribunal was satisfied in this particular instance that it was likely that not being in the later stages of pregnancy was a reasonable occupational requirement.*[150]
>
> *A human rights tribunal found that an employer had discriminated against a female employee when it refused to employ her in a section of the company that processed certain gases. The employer defended its action on the basis that, from time to time, accidental emissions may be harmful to women of child-bearing age or to a fetus. The tribunal found that the risk of harm to a fetus from the accidental emission of the gas was minimal. As well, the scientific research did not support the company's concerns. The tribunal noted that any woman who knows she is pregnant or who intends to become pregnant, could be transferred from this section until after she has given birth.*[151]

Duty to Accommodate

The Supreme Court of Canada in *Brooks v. Canada Safeway*[152] established that discrimination against pregnant women who are or may become pregnant includes not only discriminatory action, but also the failure to accommodate their special needs. Special needs during pre-natal and post-natal periods can be accommodated, short of undue hardship, in a variety of ways, including:

- a requested temporary relocation to another work station or location or re-assignment of duties; or,
- providing a flexible work schedule to accommodate medical appointments, including treatment for infertility.

As well, the special needs of women who are breastfeeding can also be accommodated in a number of ways:

- *allowing for breaks as necessary. Employees who require breaks, such as for pumping or breastfeeding, should normally be given those breaks and not be asked to forgo normal meal breaks or work additional time to make up for the breaks, unless the employer can show undue hardship; and*
- *providing a supportive environment for a woman who is breastfeeding. This may mean allowing an employee's caregiver to bring the baby into the workplace to be fed, making scheduling changes to permit time to express milk or breastfeed at work, and providing a comfortable, dignified and appropriate area so that a woman can breastfeed, or express and store breast milk at work (e.g., an area that assures a degree of privacy). In some special cases, it may involve permitting a leave of absence.*

When the application of a rule has an adverse impact on women who are or may become pregnant, the rule may violate their rights under the *Code*. Consideration should be given to introducing an appropriate accommodation measure, short of undue hardship.

Example:

> *A police officer requested light duties for the last stages of her pregnancy. The police force had a policy that did not provide a modified work program and her request for light duties was denied. Instead, she was told that she could take a part-time civilian position at a much lower salary. This meant that the officer would have to resign from the force. The human rights tribunal stated the rule of "no modified duties" was applied to all officers but it clearly excluded "pregnant women from consideration of the fact they are at higher risk during the latter stages of their pregnancy". It found that the accommodation offered was unreasonable because another male officer who was unable to work because of pending charges was given lighter duties. The tribunal concluded that the police force discriminated against the police officer because of her sex.*[153]

In this example, the policy was applied equally to all police officers and, on its face, did not discriminate. However, because the rule adversely affected those who became pregnant, it adversely affected pregnant women. The uniform application of a policy that did not allow modified duties resulted in pregnant police officers being negatively affected.

It is important to note that an employer cannot arbitrarily decide that a pregnant employee should take a leave of absence as an accommodation measure, without considering, and consulting with the employee on, other options for dealing with a situation requiring accommodation.

vi) Employees with Family Responsibilities

"Family status" is defined in subsection 10(1) of the *Code* and refers to the status of being in a parent and child relationship. This definition includes biological and adoptive parents and persons who act in the position of a parent to a child, such as a legal guardian. Men and women are equally protected under this ground.

Nevertheless, there are numerous stereotypes, especially about mothers with young children, particularly regarding their "commitment" to the job. For example, an employer may be afraid that a mother who has an infant at home may miss work more often. Others may feel that hiring or keeping an employee who may become pregnant or who is on maternity leave costs the company too much. However, human rights tribunals have rejected the argument that the cost of upgrading or retraining a woman after she returns from maternity leave is so excessive as to constitute "undue hardship."

It is true that there are real demands on men and women who are balancing work and family responsibilities. Such demands can result in significant work-related absences due to taking care of children or aging parents. Employers have a positive and supportive role to play in balancing these demands.

The employer's duty to accommodate extends to employees who have work-related absences due to family-related responsibilities. Family-related responsibilities include caring for children and caring for aging parents. More flexibility in the workplace enables employees to balance work and personal life. Alternative work arrangements allow employees to balance work and personal demands and contribute to the effective use of a skilled labour force. These arrangements may take the form of job sharing, flexibility in working hours and work schedules, *etc.*

These arrangements may be contained in collective agreements, other management-employee agreements, or individual agreements.

c) Drug and Alcohol Testing[154]

The *Code*'s definition of "disability" includes physical, psychological and mental conditions. Severe substance abuse, such as alcoholism and the abuse of legal and illicit drugs, is classified as a form of substance dependence and constitutes a disability within the meaning of the *Code*. When a person's use of drugs or alcohol reaches the stage of severe abuse, addiction or dependency (*e.g.*, maladaptive patterns of use) there may be significant impairment or distress.

When an individual is perceived to have an addiction or dependency on drugs or alcohol, the *Code* operates to protect that individual in the workplace. The person who had a drug or alcohol problem in the past but no longer suffers from an ongoing disability is also protected.

i) On-the-job testing

While it is the Commission's position that pre-employment drug and alcohol testing is not permitted, such testing may be justifiable on the job in certain circumstances.

In order to decide whether testing is necessary the following questions should be considered by employers:

- Is there an objective basis for believing that job performance would be impaired by drug or alcohol dependency? In other words, is there a rational connection between testing and job performance?
- In respect of a specific employee, is there an objective basis for believing that unscheduled or recurring absences from work, or habitual lateness to work, or inappropriate or erratic behaviour at work are related to alcoholism or drug addiction/dependency?
- Is there reason to believe that the degree, nature, scope, and probability of risk resulting from alcohol or drug dependency will adversely affect the safety of others?

Drug and alcohol testing that lacks a relationship to job performance has been found to violate employee rights. Therefore, policies on drug and alcohol testing must not arbitrarily target groups of employees.

Example:

> *An employer requires only new or returning employees to be tested. This might not be justifiable in terms of the stated objectives of the testing policy.*

As drug tests do not actually measure impairment but rather simply indicate the presence of drugs in the body, random drug testing is an unjustifiable intrusion into the rights of the individual.

With respect to random alcohol testing, the use of breathalysers is a minimally intrusive yet highly accurate measure of both consumption and actual impairment. Consequently, the Commission supports the view that random alcohol testing is *acceptable in safety sensitive positions, especially where the supervision of staff is minimal or non-existent, but only if the employer meets its duty to accommodate the needs of those who test positive* (see below).

"For cause" and "post-incident" testing for either alcohol or drugs may be acceptable in specific circumstances. Following accidents or reports of dangerous behaviour, for example, an employer will have a legitimate interest in assessing whether the employee in question had consumed substances that are psychoactive and which may have contributed to the incident. The results of the assessment may provide an explanation of the cause of the accident. Such testing should only be conducted as part of a larger assessment of drug or alcohol abuse, *e.g.*, employee assistance programs (EAP), direct medical assessment, and peer and supervisor reviews.

Employers who have determined the need for on-the-job testing should also meet the following criteria and considerations when developing on-the-job testing criteria:

1. Have arrangements been made for competent handling of test samples? Qualified professionals must perform drug and alcohol testing and the results must be analysed in a competent laboratory. Further, it is the responsibility of the employer to ensure that the samples taken are properly labelled and protected at all times.
2. Are the test results kept confidential? In order to protect the confidentiality of test results, all health assessment information should remain exclusively with the examining physician and away from the employee's personnel file.
3. Have the results of the test been reviewed with the employee? Procedures should be instituted for the physician to review the test results with the employee concerned.
4. Where mandatory self-disclosure is part of the policy, have reasonable time periods been included? Where mandatory self-disclosure is a part of a workplace drug or alcohol policy, there must be a reasonable time period within which previous substance abuse will be considered relevant to assessment of current ability to perform the essential duties. The reasonable time period is based on whether the risk of relapse or recurrence is greater than the risk that a member of the general population will suffer a substance abuse problem. Mandatory self-disclosure of all previous substance dependencies, without any reasonable limitation on how long ago these conditions occurred, has been found to be a *prima facie* violation of employee rights.
5. Have alternative methods such as functional performance testing been implemented? The Commission supports the use of methods other than drug and alcohol testing (*e.g.*, functional performance testing) where such methods exist, or the development of such tests, where feasible, to assess impairment. The Commission also encourages the development and implementation of EAPs and peer monitoring.

ii) Duty to Accommodate

Where an employee tests positive, the *Code* requires individualized or personalized accommodation measures. Therefore, policies that result in automatic loss of employment, reassignment or that impose inflexible reinstatement conditions without regard for personal and individual circumstances are unlikely to meet this requirement.

iii) The Employee Must Cooperate with the Employer

A person who needs accommodation in order to perform the essential duties of a job must make his or her needs known in enough detail and must cooperate sufficiently to enable the person responsible to respond to the request. However, this obligation does not eliminate the employer's obligation to treat the person equally even if the employer believes or perceives (even with good reason) that the employee has a substance abuse problem.

EXAMPLE:

An employee in a clerical position appears to be inebriated frequently during work hours and the employer has a conversation with him to address the problem. The employee refuses to acknowledge the problem or seek counselling at the employer's expense. Shortly after, the employee is fired without formal warning.

In this case, the employer clearly "perceived" the person to have a substance abuse problem and therefore the protection of the Code is engaged. The fact that a person refuses treatment or accommodation does not in and of itself justify immediate dismissal. The employer has to demonstrate, through progressive discipline, that the employee has been warned and is unable to perform the essential duties of the position. If the employee refuses offered accommodation and if progressive discipline and performance management have been implemented, then disciplinary steps can be taken.

An employer must provide the support necessary for an employee with a drug or alcohol addiction/dependency to undertake a rehabilitation program, unless providing such accommodation would cause undue hardship.

iv) Alternative Programs

Employers are encouraged to consider establishing such alternatives as an employee assistance program, including off-site counselling and referral services. These can be helpful, not only for individuals with drug or alcohol addiction/dependency, but in assisting employees to cope with stresses that may lead to an addiction or dependency. Other alternatives include performance tests for safety-sensitive positions in which physical and/or mental coordination are essential.

d) Harassment and Personal Safety

Harassment in the workplace has the potential to cause risk to personal safety. Harassment affects self-esteem, integrity and well-being. In some situations, it may involve violence – real or implied – against an employee.

Employees who fear harassment may stay away from work to avoid the stress. Chronic stress-related illnesses frequently result from workplace harassment. Sometimes victims reluctantly quit their jobs in an effort to avoid a difficult situation or seek other ways to avoid the person.

Employers are expected to develop workplace policies to prevent harassment. In addition to developing anti-harassment policies, employers should also develop workplace violence prevention policies and train their employees on harassment.

Where a person alleging harassment and the alleged harasser work together or near one another, the employer should consider moving one of the parties to another location or placing one of them on a paid leave of absence until the matter has been appropriately resolved.

In rare circumstances, the harasser may resort to physical violence, resulting in tragedy. In these cases, it is important to remember that if there is reasonable cause to fear violence, employers should do everything possible to minimize the threat of violence to all their staff and, where appropriate, ensure that the police are informed.

e) Employee Benefits and Human Rights

i) Group Insurance, Benefit and Pension Plans

Disabilities

Discrimination may take place where a term or condition of employment requires enrolment in a group insurance contract and an applicant does not qualify for the insurance plan because of a disability. The term or condition of employment itself would be viewed as a violation of the *Code*.[157]

If an employee is excluded because of a disability from a benefit, pension or superannuation plan or fund or a contract of group insurance, an employer must compensate the employee an amount equivalent to the contribution that the employer would otherwise make on behalf of an employee who does not have a disability.[158]

Compensation to employees takes on different forms, such as contributions to benefit premiums or accrual of vacation credits. Where employers, as a matter of course, pay a certain form of compensation to other employees who are absent from work, employees absent due to disability are also entitled to such compensation.[159]

Same-Sex Benefits

As a result of the 1999 Supreme Court decision in *M. v. H.*[160] and amendments to section 25(2) of the *Code* to include same-sex partnership status, same-sex couples are equally entitled to the benefits of employer pension and benefits plans.

Section 25(2) of the *Code* permits group insurance and pension contracts between employers and insurers to allow for differential treatment based on same-sex partnership status so long as they comply with the *Employment Standards Act* (ESA) and its regulations. The ESA and regulations require employers to provide the same benefit entitlements to employees with same-sex partners as are provided to employees with opposite-sex partners.

Therefore, individuals in same-sex partnerships, as defined in subsection 10(1) of the *Code*, are entitled to the same benefits as individuals in opposite-sex partnerships with regard to employee superannuation or pension plans or funds or a contract of group insurance between an insurer and an employer that complies with relevant legislation and regulations.

Examples:

- *An employer must provide individuals in same-sex relationships with the same spousal benefits provided to individuals in opposite-sex relationships under their pension benefits plan and insured health benefits plan.*
- *A pension plan must provide same-sex partners with the same employment survivor benefits that are provided to opposite-sex partners.*
- *An employer must provide equivalent survivor benefits to its gay and lesbian employees as it does to its heterosexual employees.*
- *An insurance company's refusal to pay survivor benefits to an individual whose same-sex partner dies is a violation of the* Code.

Older Workers

The protections in the *Code* extend to pension plans. Such plans take effect once persons reach a certain age and are, therefore, of particular concern to older persons. As well, other grounds of discrimination such as disability, marital status and same-sex partnership status are often relevant when considering pension benefits.

Issues associated with pensions and benefits are often complex as they are governed by a complex statutory regime as well as actuarial factors. Complaints of discrimination in pension and benefit schemes must be considered on a case-by-case basis. In addition to the ability to justify a pension regime as a *bona fide* occupational requirement, and the fact that some distinctions within pension and benefit plans may not be discriminatory within the meaning of human rights law, section 25(2) of the *Code* contains specific rules for pension and benefit plans.

Section 25(2) of the *Code* permits group insurance and pension contracts between employers and insurers to allow for differential treatment based on age so long as they comply with the ESA and regulations. The ESA regulations permit differential treatment because of age based on actuarial factors and if the legislation governing pensions permits.[161]

Sick leave plans that make benefits available based on age have been found to be discriminatory.[162] Reduced pension benefits for early retirees have been found not to be discriminatory where the actuarial present value of reduced pensions for early retirees is at least equal to the present value of the deferred pension for those who wait until the age of eligibility for full pensions.[163] Similarly, basing eligibility for pension benefits on reaching a certain age will not likely be considered discriminatory.[164]

ii) Maternity Leave, Health-Related Absences and Related Benefits

Employee benefit plans or employment practices that result in disadvantage because of pregnancy constitute discrimination under the *Code* on the basis of sex and pregnancy.

A Divisional Court decision, *Crook v. Ontario Cancer Treatment and Research Foundation*, confirmed a tribunal's decision that sick leave benefits should be available for health-related reasons to a woman who has recently given birth, when she has chosen not to go on maternity leave under the *Employment Standards Act*.[165]

The Supreme Court of Canada has said that pregnancy leave should be included in employee benefit plans without having to be categorized as an illness, accident or a disability.[166] If a pregnant employee produces proof that she must be absent from work for health-related reasons, at whatever stage this might be during the pregnancy, she cannot be treated differently or adversely from other employees who are also absent from work for other "health-related reasons."

"Health" includes:

- the physical and psychological health of the woman;
- the health, well-being, growth and development of the fetus; and,
- a woman's ability to function as a social being, interacting with her family, employer and significant others.

A "health-related absence from work" can therefore mean any absence that is related to a woman's health or the health and well-being of the fetus.

Pregnancy leave is used for bonding and nurturing. As well, different women have different medical and physiological needs following childbirth depending on their circumstances and the time required to recover from childbirth varies. Because women respond differently to pregnancy, requests for health-related absences are usually assessed and granted on an individual basis. Pregnant employees who require leave for health-related pregnancy concerns should follow the proof-of-claim procedures of the employer's benefit plan to establish that the health-related absence is valid.

An Alberta court decision in *Alberta Hospital Association v. Parcels*[167] concluded that:

- Where an employer has a benefit plan that compensates health-related absences or provides disability benefits to its employees, a woman should be entitled to disability benefits during that portion of the pregnancy or parental leave that she is unable to work for health reasons related to the pregnancy and childbirth. Payment must begin as soon as the pregnant woman is away from the workplace for a health-related reason.
- Any health-related portion of maternity leave is to be treated the same as other health-related leaves such as a sick leave or disability leave. The employee should be compensated at substantially the same level and should be subject to the same conditions as an employee who becomes ill, such as the requirement to provide a medical confirmation for the absence.[168]
- Pregnant employees are to be compensated for the full period of their health-related absence, whether it occurs during the pre-natal to post-natal period, including recovery from childbirth.

Section 25(2) of the *Code* permits group insurance contracts between employers and insurers to allow for differential treatment based on sex so long as they comply with the ESA and regulations. The *Act* and regulations require employers to provide the same benefit entitlements to employees on pregnancy leave or parental leave that are provided to employees who are on other types of leave.

Finally, a woman may have health problems related to her pregnancy that force her to be away from work *before or after* her pregnancy or parental leave. She can access health benefits under a workplace sick or disability plan in this situation. However, it is important that she ascertain her dates of leave with the Employment Standards Branch at the Ministry of Labour since her decision to take short- or long-term disability leave may affect her right to take pregnancy and/or parental leave. There are strict rules regarding when a woman is entitled to take pregnancy or parental leave and when she must notify her employer.

Regardless of whether or not a sick-leave plan is based on a contract of group insurance, women on maternity leave continue to be entitled to other benefits under employment-related benefit plans including pension plans, life insurance plans, accidental death plans, extended health plans and dental plans.[169] Employers are also required to continue to make contributions to such plans.[170]

An employee cannot be terminated, demoted or laid off because she was pregnant. She has the right to return to her job, receive benefits and not to be passed over for opportunities such as training and assignment projects.

The *ESA* sets out further rights relating to pregnancy and parental leave.[171] Additionally, if eligible, an employee can claim "maternity benefits" under the federal *Employment Insurance Act*.

f) Advancement, Promotion, Developmental Opportunities

The *Code* provides that every employee should be treated equally with regard to advancement within the organization. This means that decisions made in relation to advancement, promotions and developmental opportunities should be made based on objective evidence related to job performance and abilities and not on subjective assessments that are based on stereotypes or unfounded assumptions related to a ground protected by the *Code*.[172]
As well, employers should ensure that performance management is carried out in a non-discriminatory manner. For example, it would be discriminatory to subject the work of a pregnant employee to a higher level of scrutiny or to fail to performance manage an older worker because of a perception that the performance is linked to age.

Examples:

> *The B.C. Human Rights Council (B.C.H.R.C.) found that an employer discriminated against a pregnant employee when the employer failed to consider her for a promotion. Instead, she was demoted immediately before she was scheduled to go on maternity leave. The tribunal reviewed evidence that the employee was not provided with a written evaluation of her performance and that less than a standard period of time was allowed for the employee to meet performance objectives. It concluded that these also constituted discrimination on the basis of pregnancy.*[173]
>
> *An employer assumes that an older worker is too difficult to train and, in any event, is "riding it out" to retirement. She is not sent for training and is given performance reviews that do not meaningfully identify strengths and areas where there is room for improvement. Her skills do not*

> *remain current, she cannot work on improving in her weaker areas and she is less motivated to work hard because she feels she is not a valued worker, is not expected to perform and will never be recognized for her contribution.*
>
> *An organization was concerned about the aging of its employees and the fact that there could be a number of managers retiring within a 15-year period. Accordingly, recruitment practices were modified to meet the "long-term professional needs of the department." Statistical evidence on age distribution of employees showed a disproportionate number of employees under 40 and the vast majority of recruits are under 30. A tribunal found that the organization had set about recruiting a younger work force and that the 43-year-old complainant who had been with the organization seven years was not offered a promotion into a particular position, in part because he did not fit the profile for the organization's recruits into that position.*[174]

Seniority is generally a consideration in the promotion, advancement, lay-off or recall of an employee and may be a deciding factor between employees. Therefore, employees who are absent due to disability[175] or pregnancy[176] should not be treated differently from other employees in the accrual of seniority. It is not permissible to use age to assign seniority when more than one employee is hired on the same day.

i) Equal Opportunity

The fundamental purpose of the *Code* is to ensure equal opportunity and equal treatment of all members of society; this includes equal opportunity in employment. Equal opportunity acknowledges that systemic barriers may exist which in turn can prevent employers from identifying the best people for jobs, promotions and training opportunities, and prevent employees, for example, persons with disabilities, from maximizing the use of their abilities.

A systemic barrier is often not just a single rule or policy but a series of policies and/or procedures that, when combined, result in the exclusion of people identified by a *Code* ground. Identifying and removing systemic barriers is good business and may also reduce and prevent the filing of human rights complaints.

All employers should understand and be aware of the possibility that systemic barriers may exist within their organization and actively seek to identify and remove them.

More information on equal opportunity plans can be obtained from:

> **Paths to Equal Opportunity and Disability Partnerships**
>
> The Government of Ontario has a helpful Web site with resources for businesses and service providers that will help them create inclusive workplaces and remove barriers preventing full independence and opportunity. The Web site focuses mainly on persons with disabilities.
>
> **Telephone Information/Referral Line:**
> (416) 325-4957 from 416/905 local calling areas or 1-888-325-4957 toll-free in Ontario.
>
> **TTY:** (416) 326-0148 from 416/905 local calling areas or 1-888-335-6611 (toll-free in Ontario). Contact them through the Bell Canada Relay Service at voice number (416) 325-6253. Collect calls accepted.
>
> **E-Mail:** einfo@mczcr.gov.on.ca
>
> **Web Site:** http://www.equalopportunity.on.ca
>
> **Write:** Ministry of Citizenship and Immigration
> Public Education and Partnerships Unit
> Accessibility Directorate of Ontario
> 400 University Avenue, 3rd Floor
> Toronto, Ontario M7A 2R9

ii) Training

The *Code* provides that every employee should be treated equally with regard to internal and external training opportunities in the organization. This means that all decisions made in relation to training opportunities should be made using a non-discriminatory process.

Example:

> *An organization that provides education opportunities to staff based on the discretionary decisions of management could risk having a complaint made against them if an employee believed that he or she was being denied educational opportunities because of a ground in the* Code. *An example of a program that may avoid such problems would be one that allows all employees to attend one educational activity per year provided it is related to their work, identified in their performance goals and objectives and not more than a set dollar amount.*

g) Special Situations

i) Discipline

The Commission recognizes the right of the employer to manage its workforce. In order to avoid the appearance of a *Code* violation, it is important for the employer to make sure that when discipline (including termination) is imposed, it is done in a fair and consistent manner, within the organization's established policies and based on objective and quantifiable information. Additionally, the reasons for discipline should be consistent with the organization's established policies and history of terminating employees.

Example:

> *Mr. Smith, a white male, is constantly late for work but his supervisor has never warned him about this inappropriate behaviour. A co-worker, Mr. Lyn, a Chinese male, was late twice and received a warning letter from the supervisor. There may be a perception on the part of Mr. Lyn that he is being treated unfairly by the supervisor because Mr. Smith never received a similar letter.*

Before terminating or sanctioning an employee for "unacceptable behaviour," an employer might first consider whether the actions of the employee are caused by a disability, especially where the employer is aware or perceives that the employee has a disability. For example, a severe change in an employee's behaviour could signal to an employer that the situation warrants further examination. Progressive performance management and discipline and referrals to employee assistance programs should be used before sanctions or termination are considered.

Mental illness should be addressed and accommodated in the workplace in the same way as other disabilities. In some cases, an employer may be required to pay special attention to situations that could be linked to mental disability. Even if an employer has not been formally advised of a mental disability, the perception of such a disability will engage the protection of the *Code*. Prudent employers should try to offer assistance and support to employees before imposing severe sanctions. It should be borne in mind that some mental illnesses may render the employee incapable of identifying his or her needs.

Example:

> *John has bipolar disorder which he has chosen not to disclose to his employer because he is concerned about how he would be treated at work if it were known that he had a mental disability. He experiences a crisis at work followed by a failure to appear at work for several days. The employer is concerned about John's absence and recognizes that termination for failure to report to work may be premature. The employer offers John an opportunity to explain the situation after treatment has been received and the situation has stabilized. Upon learning that a medical issue exists, the employer offers assistance and accommodation.*

ii) Restructuring, Downsizing and Early Retirement[177]

When an organization is planning for restructuring it should consider possible human rights implications by considering the following questions:

- How will the restructuring impact staff?
- Will there be any adverse impact on staff who may be protected by a ground under the *Code*?
- Are there any staff that are away from work because of pregnancy or a disability? If so, has the impact of restructuring on them been considered?
- If the workplace is unionized, what is the union's role?

Exploring the answers to these questions may reduce the likelihood that a human rights complaint will be made against the organization. It is also advisable to communicate the rationale of restructuring to staff to decrease the apprehension of bias or prevent perceptions of discriminatory treatment.

Example:

> *Due to an economic downturn, a company was forced to lay off staff. Two foremen, one 56 and the other 57 with over 32 years service were selected for termination. Both were offered a generous retirement package. The two foremen who remained were younger than the two released. The vice-president had prepared a note indicating that the two older workers who were terminated were told of the need to reduce people and that they "hoped to keep people with career potential." The tribunal found age discrimination on the basis of the good employment record of the complainant, the ages of those selected for lay-off compared to those retained and this statement which was found to be a "euphemism; its meaning concerning age."*[178]

On the other hand, there are ways in which employers can ensure that the decisions made in a workplace reorganization will be fair and non-discriminatory. Criteria should be objective and not based on subjective impressions about the particular worker's enthusiasm, flexibility or willingness to adapt. They should be demonstrably related to the goals of the reorganization or the needs that have been identified by the company. Ideally positions, rather than people should be selected for elimination and those positions should not subsequently be refilled.

iii) Early Retirement Packages

In the course of restructuring and/or downsizing, organizations will often offer employees "early retirement" packages as an incentive to promote voluntary exits from the workforce. This can have many benefits to all workers: older workers may be offered a lucrative incentive which will allow them to pursue other interests or ambitions while at the same time ensuring that fewer workers will involuntarily lose their jobs. When designed properly, early retirement schemes are appropriate and will not raise human rights concerns. However, as early retirement schemes by definition target older workers, great care must be employed in using them as a means to achieve downsizing objectives.

The fact that a generous retirement package is offered will not defeat a claim of age discrimination if the early retirement option was not truly voluntary, *i.e.*, if there is direct or implicit pressure being applied to accept retirement.

Example:

> *A company decides that it needs to reduce its workforce by 10%. Human Resources reviews all employee files and identifies all workers over the age of 60. Each one of them is called in for a meeting with management and told that they are nearing retirement age and should accept an early retirement package so that younger persons won't lose their jobs. They are warned that if they do not do so, their position may be selected for elimination in which case they will simply receive severance and lose the opportunity to receive the early retirement package. Under these circumstances, some older workers feel compelled to accept the offer despite the fact that they were planning to work longer. This may result in a human rights complaint.*

Employers can take steps to ensure that an offer of early retirement is not coercive:

- *Define the eligibility criteria for the voluntary retirement program and share them with all staff, irrespective of age, through a neutral medium such as a written document. A response deadline and contact who can provide information should be provided so that those who qualify and are interested in the option can then decide if they wish to follow up on the offer, without any pressure from management. Some employers even choose to offer similar voluntary exit incentive packages to persons who are not near retirement age.*
- *Do not make any link between acceptance of the package and job loss. If the workforce is being downsized, indicate what the criteria will be for selecting the jobs that will be eliminated. Employees can even be assured that eligibility for the voluntary exit program will not influence decisions about job loss.*

On the other hand, an employee cannot claim age discrimination if the employer does not offer him or her access to the voluntary exit program because the employer still requires his or her services.[179]

Finally, it should be remembered that mandatory retirement policies that require employees to retire before 65 years of age are discriminatory unless age is a reasonable and genuine job requirement that cannot be accommodated short of undue hardship.[180]

V

HUMAN RIGHTS COMPLAINTS

The best defense against human rights complaints is to be fully informed and aware of the responsibilities and protections included in the *Code*.

Organizations should be pro-active in creating fair and equitable workplaces. Part of being pro-active means establishing anti-discrimination and harassment policies and developing accommodation policies and procedures. These policies and procedures should stress the importance of inclusive workplace/job designs, conducting accessibility reviews and the removal of barriers identified by such review.[181]

part one | INTERNAL COMPLAINTS PROCEDURES IN YOUR ORGANIZATION[182]

Employers are responsible for dealing effectively, quickly and fairly with situations involving claims of harassment or discrimination (which includes failure to accommodate employee needs). Employers could be held liable by a court or human rights tribunal if they or responsible staff members do not act to end discrimination or harassment in their workplaces.

When an act of harassment, discrimination or a need for accommodation is ignored, there are costs in terms of low employee morale, high stress, damaged professional reputations and employee absences.

> *There are many benefits to developing internal human rights policies and procedures to resolve complaints as part of a broad program to build a harassment-free and discrimination-free environment. Dealing promptly with these issues saves time and money. Letting people know the rules and defining unacceptable forms of behaviour makes it possible to avoid costly and upsetting hours in the courts or before special tribunals. Strong policies and programs that prevent human rights complaints make good business sense.*

The following should be part of any complete strategy to resolve human rights issues that arise in the workplace:

- anti-harassment and anti-discrimination policies;
- a policy and procedure for accommodating persons with *Code*-related needs;
- a complaint resolution procedure; and
- on-going education programs.

These elements should be developed in cooperation with the union or other workplace partners. Unions are important partners in the creation of a non-discriminatory workplace. As part of a "best practices" initiative, they should work in partnership with employers in the development of internal policies and procedures. Unions should also take a pro-active role in human rights training and education for their members specifically, and for the entire workplace in general.

a) Policies

All employees should be aware of internal policies and any procedures in place for resolving complaints. This can be done by:

- distributing policies to everyone as soon as they are introduced;
- making newly hired employees aware of them

by including the policies in any orientation material;

- training the management team on the contents of the policies; and
- providing ongoing education on human rights issues.

i) Anti-discrimination/harassment Policy

The following is a guide to some best practices that an employer should consider when developing this policy.

Content of the Policy:

- A statement setting out the employer's commitment to a fair and equitable workplace free of discrimination and harassment and that discrimination/harassment will not be tolerated by the employer/organization.
- A statement of rights and obligations, including:
  - employee rights;
  - employer/supervisor obligations;
  - union obligations;
  - an explanation of corporate liability for the behaviour of officers, managers, employees, *etc.*; and
  - a statement indicating that no reprisals are permitted or will be taken against an individual making a complaint.
- A list of the prohibited grounds of discrimination listed in the *Code*.
- The *Code* definitions of "harassment" and of "sexual harassment/solicitation".
- An explanation of the concept of a "poisoned environment" as a violation of the *Code*.
- Description/examples of unacceptable behaviour, such as:
  - refusal to hire/promote based on a ground listed in the *Code*;
  - examples of harassment based on a ground listed in the *Code*; and
  - examples of what would constitute sexual harassment, *etc.*
- How internal complaints will be handled, including:
  - to whom is the complaint made;
  - confidentiality; and
  - length of time for complaint to be investigated, *etc.*
- Disciplinary measures that will be applied if a claim of harassment or discrimination is proven.
- Remedies that will be available if the claim of harassment or discrimination is proven, such as:
  - an oral or written apology from the harasser/person who discriminated and company;
  - recovery of lost wages, benefits, job or promotion that was denied; and/or
  - compensation for injury to dignity.
- A statement reinforcing the right of employees to go to the Commission at any time during the internal process, as well as an explanation of the 6-month time requirement in the *Code*.

ii) Accommodation Policy

The *Code* requires an effort, short of undue hardship, to accommodate the needs of persons or groups who are protected by the *Code*. The principle of accommodation involves three factors: dignity, individualization, and inclusion. The accommodation process, as well as the accommodation itself, should respect these principles.

The principle of accommodation applies to all grounds of the *Code*, but certain grounds and issues arise frequently in the area of employment, notably: creed, family status, pregnancy and disability.

The following is a guide to some best practices that an employer should consider when developing the policy.

Content of the Policy:

- A statement setting out the employer's support of and commitment to accommodating an employee's needs based on a ground listed in the *Code*.
- A list of the *Code*'s grounds.
- An outline of duties and responsibilities in the accommodation process.[8]
- A description and/or examples of the types of accommodation that may be made: *e.g.*, adjustments to workstations; technical aides, such as hearing assistive devices; provision of quiet, private rooms for prayer, breastfeeding, *etc.*
- How requests for accommodation will be handled, including:
  - to whom the request is made;
  - documentation required;
  - confidentiality; and

- timelines for the various steps in the accommodation.

- How accommodation plans will be prepared and documented.
- The procedures for monitoring and evaluating implementation of the accommodation.
- A statement explaining the right of employees to file a complaint with the Commission, as well as an explanation of the 6-month time requirement in the *Code*.

*iii) Rights Under the **Code** Preserved*

Internal anti-harassment and anti-discrimination policies are not "laws" and therefore are not alternatives to filing a complaint under the *Code*. Therefore, if the in-house process or policy does not resolve the dispute, the complainant has the option to file a complaint with the Commission. It is important to communicate to employees that having an internal complaint resolution procedure in place does not in any way stop an individual from going to the Commission if she or he wants to. Some employees may also have rights under employee collective agreements that will give them other choices for dealing with a complaint.

However, the Commission may decide not to deal with a matter if more than six months have elapsed since the last alleged incident[184] or if the matter could have been handled by an internal grievance procedure pursuant to a collective agreement.[185]

b) Complaint Resolution Procedures

While internal complaint resolution procedures will vary from employer to employer, all procedures should ensure that the following obligations are met:

- the complaint must be taken seriously;
- it must be acted on promptly when it is received;
- appropriate resources must be applied to resolve the complaint;
- a viable complaint mechanism must be in place;
- the procedure must ensure that a healthy work environment is created and maintained for the complainant; and
- decisions/actions taken by the employer must be communicated to the complainant.

i) Appoint an Advisor

A person who feels that she or he has been discriminated against or harassed in the workplace may want to discuss the situation with someone who is familiar with the employer's internal anti-discrimination/harassment/accommodation policy. Such an advisor should be able to provide information about how to deal with the problem, including information on how to file an internal complaint. The person complained of should also have the right to meet with the advisor.

Ideally, the advisor is neutral, objective and knowledgeable about human rights issues. He or she should be able to provide information and explain the options available for dealing with a problem including approaching the Commission for help.

The advisor should also know about grievance procedures under collective agreements or other internal complaint processes. He or she must also ensure that all information is kept in the strictest of confidence.

ii) Alternate Dispute Resolution

When developing complaint procedures, it is a good idea to use Alternate Dispute Resolution (ADR) as part of a "best practices" approach.

ADR can provide a means of resolving a situation before an official complaint is filed with the Commission, a process that will be costly to the organization in both financial and human terms.

ADR can be a simple, informal procedure using a peer review panel or other trained internal employee. However, the sensitivity of human rights complaints from both an employer/organizational and employee perspective, coupled with the need for strict confidentiality suggest that a more formalized type of ADR might be more appropriate.

ADR can take the form of internal or external mediation. A mediator is a neutral third party who acts as a facilitator to help the parties reach a negotiated settlement to which both parties agree.

In situations where the parties do not feel comfortable attending a mediation session by themselves, they should be allowed to have someone represent them if they wish.

It is important to recognize that ADR will not be appropriate in all circumstances – for example, in situations where there are significant power imbalances. The Commission recommends that ADR be offered as a voluntary option.

ADR is well suited to internal human rights complaints. Human rights complaints involve allegations of discrimination and/or harassment that, if made public though traditional legal action, can be costly to an employer in terms of reputation, revenue and employee morale. Both the employer and the employee have invested time and/or money in career development. It is in the interest of both the employer and the employee to settle complaints in a manner that saves time, reputations, employee turnover and provides a win-win situation for all.

iii) Investigators

In cases that appear to warrant an investigation, the employer should appoint a neutral person to examine the circumstances of a complaint. They should, therefore, be as independent and objective as possible. Wherever possible, an investigator should not be in a position of direct authority over any of the people involved in a complaint but should report to someone with the authority to make decisions and have them enforced. Otherwise, the process will be seen to be weak and "lacking teeth".

An investigation should not be carried out by anyone who could be seen as taking sides with either party. For example, it is not very likely that a lawyer who often represents management in labour disputes will be seen as being objective by non-management employees. Also, the investigator should not be someone in a position of power or influence over the career progress of either of the parties.

Investigators must:

- know about human rights, the *Code* and any internal policy; and
- ensure the investigation process is confidential.

In most cases, investigations should start immediately after an investigator is chosen and finish within a specified time period, such as ninety days.

As noted above, investigation is not the only option. In some circumstances, mediation may be appropriate if both parties agree.

iv) Documentation

It is important for everyone involved in the process to make and keep written notes about the events leading to the complaint. These details should include:

- what happened: a description of the events or situation;
- when it happened: dates and times of the events or incidents;
- where it happened;
- who saw it happen: the names of any witnesses, if any; and
- any other documents or material such as letters, notes or offensive pictures connected to the behaviour or course of conduct that is the subject of the complaint.

c) Protection against Reprisal

A person who makes a complaint, or who is involved in it, should not be penalized for doing so. If this occurs, it is called reprisal and is prohibited by the Code.[186]

Persons protected from reprisal include:

- *complainants*
- *witnesses*
- *advisors*
- *representatives of complainants and witnesses*
- *investigators*
- *decision makers/management.*

Protection from reprisal arises not only when a formal complaint is filed with the Commission, but also when a person exercises rights available under the *Code* and/or under an employer's anti-discrimination/harassment/accommodation policies.[187]

Examples:

> *An employee believes that she was given an unfair performance appraisal and passed over for skills upgrade training because she is older than other workers in her department. After she launches an internal complaint, she is demoted and transferred to another department.*
>
> *An employee believes that he was not promoted in his job because of his race. He tells his manager that*

he will contact the Commission to see about filing a complaint. The next day he is fired.

An employee quits her job after making a sexual harassment complaint under the Code *against her employer and obtains new employment. She discovers that her previous employer contacted her present employer and made negative comments about her because of her complaint.*

d) Resolution

If a complaint cannot be settled through the internal procedure, the employee should be told that a complaint may be filed with the Commission or a grievance filed with the union (if one is present in the particular workplace). The complainant should be advised to do so within 6 months of the date of the last incident alleged, in order to preserve his or her rights.

e) Education/Training Programs

Education is an important part of preventing discrimination/harassment in the workplace. Training programs for all staff members ensure that everyone knows the rules and how they will be applied. Given that tribunals will often look at an employer's education programs to determine the level to which the employer has met its obligations under the *Code*, having an effective education/training program could help resolve the matter should a complaint be filed.

All those responsible for enforcing or advising on workplace human rights policies or procedures should be knowledgeable about them. The organization can:

- *provide up-to-date information about human rights issues and important court decisions or human rights tribunal decisions in human rights law;*
- *ensure that all staff are trained in dealing with discrimination and harassment in the workplace;*
- *measure the effectiveness of policies and procedures and make necessary changes; and*
- *respond immediately to claims of discrimination or harassment.*

Both the complainant and the person against whom the complaint is made should know the way the internal procedure works. This includes such information as:

- who will investigate the complaint;
- how long the process will probably take;
- the form the final report will take;
- the person(s) responsible for deciding what action the employer will take; and
- possible solutions or results.

The complainant should also be told that there is a time limit, in most circumstances, of six months between the conduct or course of behaviour complained of and filing a complaint with the Commission.

The Commission has the discretion not to deal with complaints filed after six months.[illegible] Very often, collective agreements include shorter time limits (sometimes just days or weeks). Employees should be made aware of such rules.

The Commission can assist an organization in deciding how to provide education and training to employees.

The following checklist suggests some general guidelines for implementing an education/training program:

Checklist:

- Have all employees been made aware of the internal policies?
- Are all new employees provided with copies of the policies at orientation?
- Is there visible support from the Board of Directors/CEO/senior management?
- Has senior management been trained in order to ensure that there is "buy-in" from the top down?
- Are all managers aware of their duties and responsibilities under the *Code* and the internal policies?
- Have all managers with hiring responsibilities received training on how to draft job advertisements and conduct interviews?
- Is training ongoing? *i.e.*, is information about human rights changes, policies, court decisions, *etc.* provided? Are all new managers given human rights training?
- Have employees responsible for complaint resolution, employee advice, *etc.* received specialized training?

- Are your "trainers" trained and up-to-date?
- Are there policy statements and reminders posted around the workplace to remind staff of and communicate to visitors (contractors, customers, *etc.*) the importance of and seriousness with which the policies are taken?

f) Collective Agreements and Complaints

Increasingly, collective agreements and company policies include clauses specifically related to preventing and resolving incidents of discrimination and harassment in the workplace. Employers and labour representatives recognize their liabilities under the *Code* as well as the responsibilities they share for maintaining workplace environments free of discrimination and harassment.

A recent Supreme Court of Canada decision[viii] has confirmed that grievance arbitrators in Ontario have a responsibility to implement and enforce the substantive rights and obligations of the *Human Rights Code* and other employment-related statutes as if they were part of the collective agreement. The *Human Rights Code* and other employment-related statutes establish a floor beneath which an employer and union cannot contract.

V HUMAN RIGHTS COMPLAINTS

part 2 | COMPLAINTS TO THE ONTARIO HUMAN RIGHTS COMMISSION

a) Overview of the Process

A person who wishes to complain directly to the Commission has the right to do so, whether she or he has used, or has chosen not to use, the company's internal procedures.

If a person has a human rights complaint, he or she may contact the general inquiry line at 1-800-387-9080 or in Toronto at (416) 326-9511 (TTY Local: (416) 314-6526, TTY (Toll Free): 1-800-308-5561) from Monday to Friday during office hours. A Commission staff person will advise as to whether the issue is covered by the *Code*.

The Commission is neutral and does not take sides in the complaint. Commission staff will provide information to both parties about the *Code* and complaint procedure. However, if either party requires legal advice, they should contact a lawyer.

Commission staff will work with both parties to try to settle the dispute if possible. Voluntary and confidential mediation services are offered to both parties. If that is unsuccessful, or one of the parties declines to participate, the Commission will investigate the matter.

The *Code* does not require the Commission to deal with all complaints. The respondent can ask the Commission not to deal with the complaint or the Commission will choose to not become involved if it is of the opinion that the complaint:

- could be more appropriately dealt with under another piece of legislation;
- is trivial, frivolous, vexatious or made in bad faith;
- is not within its jurisdiction; or
- is based on occurrences that are more than six months old (unless the Commission is satisfied that the delay was incurred in good faith and that no substantial prejudice will result to any person affected by the delay).[illegible]

If conciliation is not successful, an investigator is assigned. He or she completes an investigation, including interviewing witnesses and gathering documentary evidence and then prepares a report which is disclosed to both sides who are then invited to submit a response. The investigation report contains an analysis of the evidence and a recommendation by Commission staff on how the complaint should be dealt with.

The Commissioners make the decisions whether to deal or not deal with a complaint and whether to send or not send a complaint to the human rights tribunal. A copy of the Commissioners' decision in writing is forwarded to both the respondent and the complainant.

The complainant can ask the Commissioners to reconsider their decision through an application for reconsideration within 15 days of the date that appears on the decision letter. A report will be prepared and the respondent will be given an opportunity to comment. The Commissioners make the final decision on whether or not to reverse their original decision.

The human rights tribunal is the body that hears evidence and makes the decision as to whether or not discrimination occurred. The human rights tribunal is independent from the Commission. The Commission, the respondent and the complainant are each separate parties before the tribunal. The hearing is a public proceeding. If the tribunal finds that discrimination took place, it can order remedies. The order is legally binding.

b) Remedies

Human rights legislation is designed to prevent and alleviate discrimination, not to find fault and assign blame. Remedies could include:

- restoring the complainant to a position she or he would have held, had the *Code* not been violated;
- compensation for loss of earnings or job opportunities; or
- damages for the mental anguish suffered as a result of the violation.

Human rights remedies depend on the particular case and may address public, personal and/or private issues. An organization may be required to:

- change its policies;
- implement training initiatives;
- establish a way of resolving internal human rights complaints; or
- introduce anti-discrimination and harassment policies.

vi

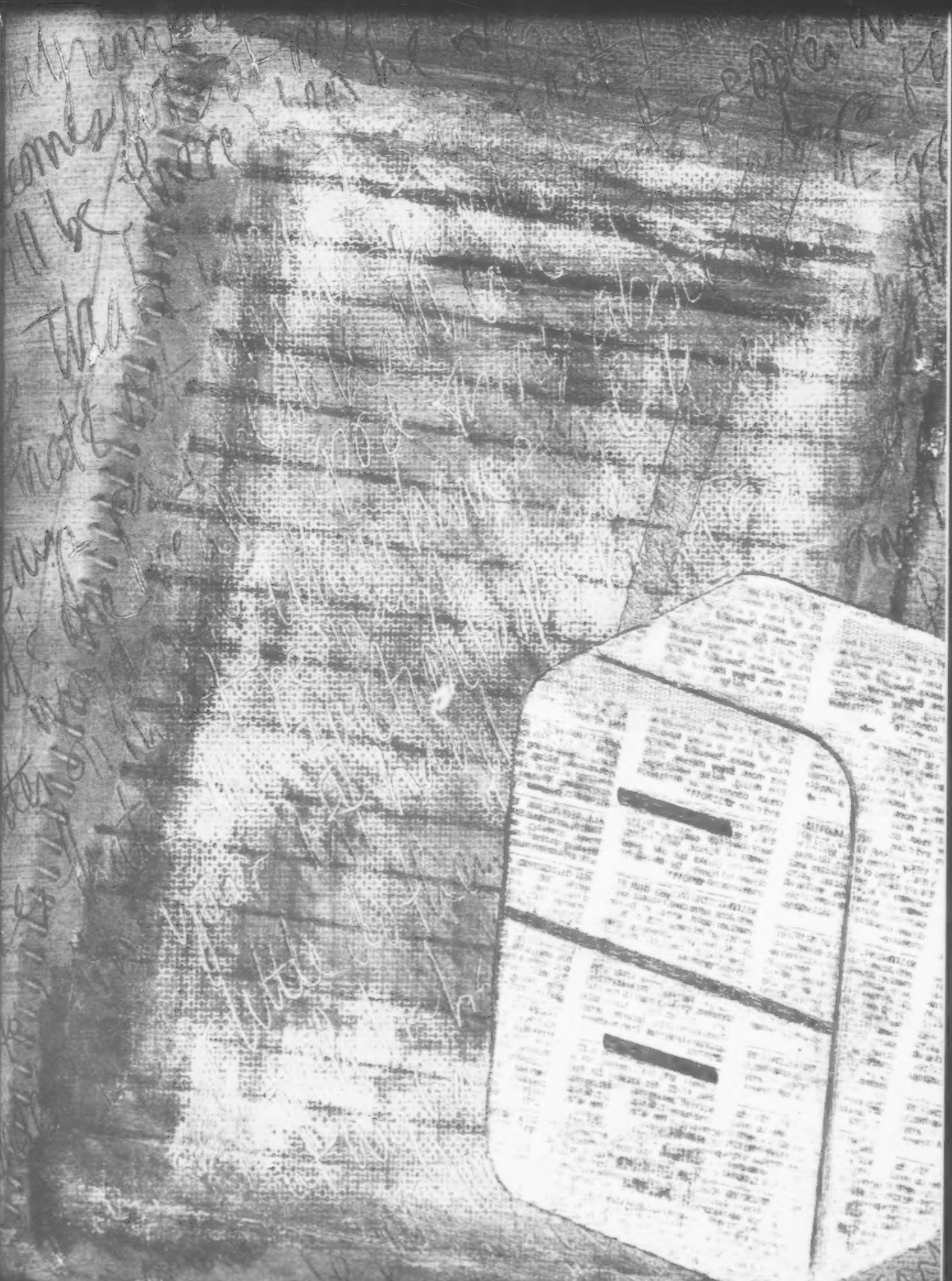
CONCLUSION

In Ontario, about three-quarters of all human rights complaints come from the workplace.

When an act of discrimination or harassment is ignored, there are costs in terms of low employee moral, high stress, employee absences and turnover, damaged professional and organizational reputation, and costly hours before tribunals and courts.

Even without the legal requirement not to discriminate, providing a fair work environment that respects the dignity of all employees is in an organization's best interests. Today's global economy, multicultural society and highly competitive corporate environment places greater demands on all organizations. Employers need to recruit and retain the best employees for their organizations and part of that process involves selecting and keeping employees with diverse backgrounds and talents from the widest possible pool of candidates.

Knowing your rights and obligations is the beginning of the process. Implementing policies and practices that create and maintain a fair work environment is the desired result of that process. To that end, a list of other resources from publications, government agencies, and community and professional organizations is included in section vii.



vii OTHER OHRC PUBLICATIONS

The OHRC Web site (www.ohrc.on.ca) is the most current and exhaustive source of information about the work of the OHRC. All OHRC publications are available via the Web site. This includes approved policies and guidelines, consultation documents and plain language publications. Information can also be found on current OHRC activities.

Bound copies of OHRC documents are only available through Publications Ontario 1-800-668-9938.

Policies and Guidelines

Commission policies and guidelines are approved statements setting out the Commission's interpretation of specific provisions of the Code. They are important because the public has a right to expect that the Commission will deal with cases in a way that is consistent with its published policies.

Guidelines on Special Programs

Policy and Guidelines on Disability and the Duty to Accommodate

Policy on Creed and The Accommodation of Religious Observances

Policy on Discrimination Against Older Persons Because of Age

Policy on Discrimination and Harassment Because of Gender Identity

Policy on Discrimination and Harassment Because of Sexual Orientation

Policy on Discrimination and Language

Policy on Discrimination Because of Pregnancy and Breastfeeding

Policy on Drug and Alcohol Testing

Policy on Employment-Related Medical Information

Policy on Female Genital Mutilation (FGM)

Policy on HIV/AIDS Related Discrimination

Policy on Racial Slurs & Harassment & Racial Jokes

Policy on Requiring a Driver's Licence as a Condition of Employment

Policy on Scholarships and Awards

Policy on Sexual Harassment & Inappropriate Gender-Related Comments and Conduct

Plain Language Documents

Plain language documents are designed for anyone seeking general knowledge about basic concepts in the Code *or seeking guidance about how to apply human rights law in the workplace or elsewhere.*

Female Genital Mutilation: Questions and Answers (available in English/French, Arabic/Somali, Swahili/Amharic)

Guide to the Human Rights Code

Guide to Mediation Services

Hiring: Your Rights & Responsibilities (available in Chinese/English, English/French, Punjabi/English, Somali/English, Spanish/English, Tagalog/English, Urdu/English, Vietnamese/English)

Hiring? A Human Rights Guide

Human Rights in Ontario: A Complainant's Guide (available in Bengali, Chinese/English, English/French, Gujarati, Hindi, Punjabi, Somali/English, Spanish/English, Tagalog/English, Tamil, Urdu, Vietnamese/English)

If You Have a Human Rights Complaint –
A Complainant's Guide

If You Receive a Human Rights Complaint –
A Respondent's Guide

Pregnancy and Breastfeeding

Pregnancy – Before, During and After:
Know Your Rights

Protecting Religious Rights

Racial Harassment: Your Rights & Responsibilities (available in Chinese/English, English/French, Punjabi/English, Somali/English, Spanish/English, Tagalog/English, Urdu/English, Vietnamese/English)

Racial Slurs and Harassment and Racial Jokes

Sexual Harassment: Your Rights & Responsibilities (available in Chinese/English, English/French, Punjabi/English, Somali/English, Spanish/English, Tagalog/English, Urdu/English, Vietnamese/English)

Sexual Harassment and Other Comments or Actions About a Person's Sex

Sexual Orientation

The Commission: What You Need to Know (available in Chinese/English, English/French, Punjabi/English, Somali/English, Spanish/English, Tagalog/English, Urdu/English, Vietnamese/English)

Other Publications

Annual Report

Developing Procedures to Resolve Human Rights Complaints Within your Organization

Human Rights Code Card (11" x 17")
(Available from the Commission)

Human Rights Policy in Ontario (2001)

Contact: CCH Canadian Ltd.
90 Sheppard Avenue East, Suite 300
Toronto, ON M2N 6X1
Toll Free: 1-800-268-4522
E-mail: cservice@cch.ca

viii RESOURCES

part one | COMMUNITY AND PROFESSIONAL ORGANIZATIONS

This resource list is not exhaustive. It was compiled by Commission staff and identifies those organizations and publications that may deal with issues related to human rights. The Commission does not endorse, promote or vouch for any of the resources. Please consult with the named resource directly for further information.

ALDERCENTRE (Adult Learning Dis-Abilities Employment Resource Centre)

120 Front Street East, Suite 208
Toronto, ON M5A 4L9
Phone: (416) 693-2922
Fax: (416) 698-6453
e-mail: ld@aldercentre.org
internet: www.aldercentre.org

Canadian Association of the Deaf

251 Bank Street, Suite 203
Ottawa, ON K2P 1X3
Phone: (613) 565-2882
TTY: (613) 565-8882
Fax: (613) 565-1207
e-mail: cad@cad.ca
internet: www.cad.ca

Canadian Council for Aboriginal Business

204 St. George Street
Toronto, ON M5R 2N5
Phone: (416) 961-8663
Fax: (416) 961-3995
e-mail: gamblechanze@aol.com
internet: www.ccab-canada.com

Canadian Council on Rehabilitation and Work

500 University Avenue, Suite 302
Toronto, ON M5G 1V7
Phone (416) 260-3060
TTY: (416) 260-9223
Fax: (416) 260-3093
e-mail: info@ccrw.org
internet: www.ccrw.org

Canadian Mental Health Association – Ontario Division

180 Dundas Street W., Suite 2301
Toronto, ON M5G 1Z8
Phone: (416) 977-5580
Fax: (416) 977-2264
e-mail: division@ontario.cmha.org
Internet: www.ontario.cmha.org

The Centre for Advancement in Work and Living

2930 Lakeshore Boulevard West
Toronto, ON M8V 1J4
Phone: (416) 231-2295
Fax: (416) 253-2727
Internet: www.cawl.org

City of Toronto – Access & Equity Centre

100 Queen Street West, City Hall
Toronto, ON M5H 2N2
Phone: (416) 392-8592
Fax: (416) 696-3645

Diversity and Employment Equity Practitioners Association

255 Duncan Mill Road, Suite 412
Toronto, ON M3B 3H9
Phone: (416) 385-2660
Fax: (416) 385-2644
Internet: www.teepa.org

Human Resources Professionals Association of Ontario

2 Bloor Street West, Suite 1902
Toronto, ON M4W 3E2
Phone: (416) 923-2324
Ontario Toll-free: 1-800-387-1311
Fax: (416) 923-7264
Internet: www.hrpao.org

League for Human Rights of B'nai Brith Canada

15 Hove Street
Toronto, ON M3H 4Y8
Phone: (416) 633-6224
Toll Free: 1-800-892-2624 or 1-800-892-BNAI
Fax: (416) 630-2159
e-mail: league@bnaibrith.ca
Internet: www.bnaibrith.ca

Urban Alliance on Race Relations

302 Spadina Avenue, Suite 505
Toronto, ON M5T 2E7
Phone: (416) 703-6607
Fax: (416) 703-4415
e-mail: uarr@uarr.org
Internet: www.urbanalliance.ca

Workers' Information and Action Centre

277 Victoria Street, Suite 102
Toronto, ON M5B 1W2
Phone: (416) 392-1203
Fax: (416) 392-1083
e-mail: wiact@city.toronto.on.ca

viii RESOURCES

part two | GOVERNMENT ORGANIZATIONS

Accessibility Advisory Council of Ontario

400 University Avenue, 3rd Floor
Toronto, ON M7A 2R9
Phone: (416) 314-7545
Toll-Free 1-877-877-0109
TTY: (416) 212-4715
TTY Toll-Free: 1-877-877-0126
Fax: (416)314-7467
e-mail: advisorycouncil@mzczr.gov.on.ca

Canadian Human Rights Commission

1002-175 Bloor Street East
Toronto, ON M4W 3R8
Phone: (416) 973-5527
Toll Free: 1-800-999-6899
TTY: 1-888-643-3304
Fax: (416) 973-6184
e-mail: info.com@chrc-ccdp.ca
Internet: www.chrc-ccdp.ca

Human Resources Development Canada – Employment and Insurance Division

Internet: www.hrdc-drhc.gc.ca
Please see the internet or your local telephone directory for locations nearest you.

Ministry of Citizenship and Immigration – Accessibility Directorate

Phone: (416) 326-0207
Toll-free: 1-888-520-5828
TTY: (416) 326-0148
TTY Toll-free: 1-888-335-6611
Email: ODA@mczcr.gov.on.ca
Internet: www.gov.on.ca/mczcr/accessibility

Miziwe Biik Aboriginal Employment Training

415 Yonge Street, Suite 1100
Toronto, ON M5B 2E7
Phone: (416) 591-2310
Fax: (416) 591-3602
e-mail: miziwe@interlog.com

Office of the Employer Advisor (Ministry of Labour)

151 Bloor St. West, Suite 704
Toronto, ON M5S 1S4
Phone: (416) 327-0020
Toll Free: 1-800-387-0774
e-mail: weboea@mol.gov.on.ca
Internet: www.gov.on.ca/LAB/oea

Office of the Worker Advisor (Ministry of Labour)

123 Edward Street, Suite 1300
Toronto, ON M5G 1E2
Phone: (416) 325-8570
Toll Free: 1-800-435-8980
Fax: (416) 325-4830
e-mail: webowa@mol.gov.on.ca
Internet: www.gov.on.ca/LAB/owa

Ontario Human Rights Commission

180 Dundas Street W. 7th Floor
Toronto, ON M7A 2R9
Phone: (416) 326-9511
Fax: (416) 326-9520
Toll Free: 1-800-387-9080
TTY (416) 314-6526
TTY Toll Free: 1-800-308-5561
e-mail: info@ohrc.on.ca
Internet: www.ohrc.on.ca

Workplace Safety and Insurance Board

200 Front Street West
Toronto, ON M5V 3J1
Phone: (416) 344-1000
Toll Free: 1-800-387-0750
TTY: 1-800-387-0050
Fax: (416) 344-4684
Toll Free Fax: 1-888-313-7373
Internet: www.wsib.on.ca

viii RESOURCES

part three | WORKPLACE ACCOMMODATION: RESOURCES ON THE INTERNET

Disability:

ARCH:
A Legal Resource Centre for Persons with Disabilities

425 Bloor Street East, Suite 110
Toronto, ON M4W 3R5
Phone: (416) 482-8255
Outside Toronto 1-866-482-2724
TTY: (416) 482-1254
TTY Outside Toronto 1-866-482-2728
Fax: (416) 482-2981
Fax Outside Toronto 1-866-881-2723
e-mail: library@archlegalclinic.ca
Internet: www.archlegalclinic.ca

Gateway to Diversity Web Site

Internet: www.equalopportunity.on.ca

Web site sponsored by the Ministry of Citizenship and Immigration (Ontario) featuring discussion and resources on workplace equal opportunity.

The Job Accommodation Network

Phone (V/TTY): 1-304-293-7186
e-mail: jan@jan.wvu.edu
Internet: http://janweb.icdi.wvu.edu

Practical approaches to accommodation strategies for persons with disabilities.

WORKink (The Canadian Council on Rehabilitation and Work)

Internet: www.workink.com

Information about accommodation as well as courses offered by CCRW on return to work processes for injured workers and how to implement an accommodation process in the workplace.

Creed / Religion:

Ontario Multifaith Council on Spiritual and Religious Care

789 Don Mills Road, Suite 608
Toronto, ON M3C 1T5
Phone: (416) 422-1490
Toll Free: 1-888-837-0923
Fax (416) 422-4359
e-mail: omcsrc@omc.ca
Internet: www.omc.ca

This Web site provides information about many of the faiths that are practiced by persons living in Ontario. Furthermore, there is a list of "holidays and observances" which can be used to determine dates of significance to each faith.

viii RESOURCES

part four | PRINT RESOURCES

Canadian Human Rights Reporter

1662 75th Avenue
Vancouver, BC V6P 6G2
Phone: (604) 266-5322
Fax: (604) 266-4475
e-mail: chrr@cdn-hr-reporter.ca
Internet: www.cdn-hr-reporter.ca

Canadian Master Labour Guide

Published by:
CCH Canadian Limited
90 Sheppard Avenue East, Suite 300
Toronto, ON M2N 6X1
ISBN 1-55367-128-7
Phone: (416) 224-2224
Toll Free: 1-800-268-4522
Fax: (416) 224-2243
Toll Free Fax: 1-800-461-4131
Internet: www.cch.ca

Ontario Employment Standards Act: Quick Reference, 2002 Edition

Published by:
Carswell Thomas Professional Publishing
One Corporate Plaza, 2075 Kennedy Road
Scarborough, ON M1T 3V4
ISBN 0-459-27718-9
Publication #22594
Phone: (416) 609-3800
Toll Free: 1-800-387-5164
Fax: 1-800-298-5094
Internet: www.carswell.com

Ontario Labour Relations Act: Quick Reference, 2003 Edition

Published by:
Carswell Thomas Professional Publishing
One Corporate Plaza, 2075 Kennedy Road
Scarborough, ON M1T 3V4
ISBN 0-459-27719-7
Publication #1940
Phone: (416) 609-3800
Toll Free: 1-800-387-5164
Fax: 1-800-298-5094
Internet: www.carswell.com

The 2003 Annotated Ontario Human Rights Code

Published by:
Carswell Thomas Professional Publishing
One Corporate Plaza, 2075 Kennedy Road
Scarborough, ON M1T 3V4
ISBN 0-459-26204-1
Publication # 595
Phone: (416) 609-3800
Toll Free: 1-800-387-5164
Fax: 1-800-298-5094
Internet: www.carswell.com

part five | SOURCES FOR GOVERNMENT PUBLICATIONS

Ministry of Labour, Publications

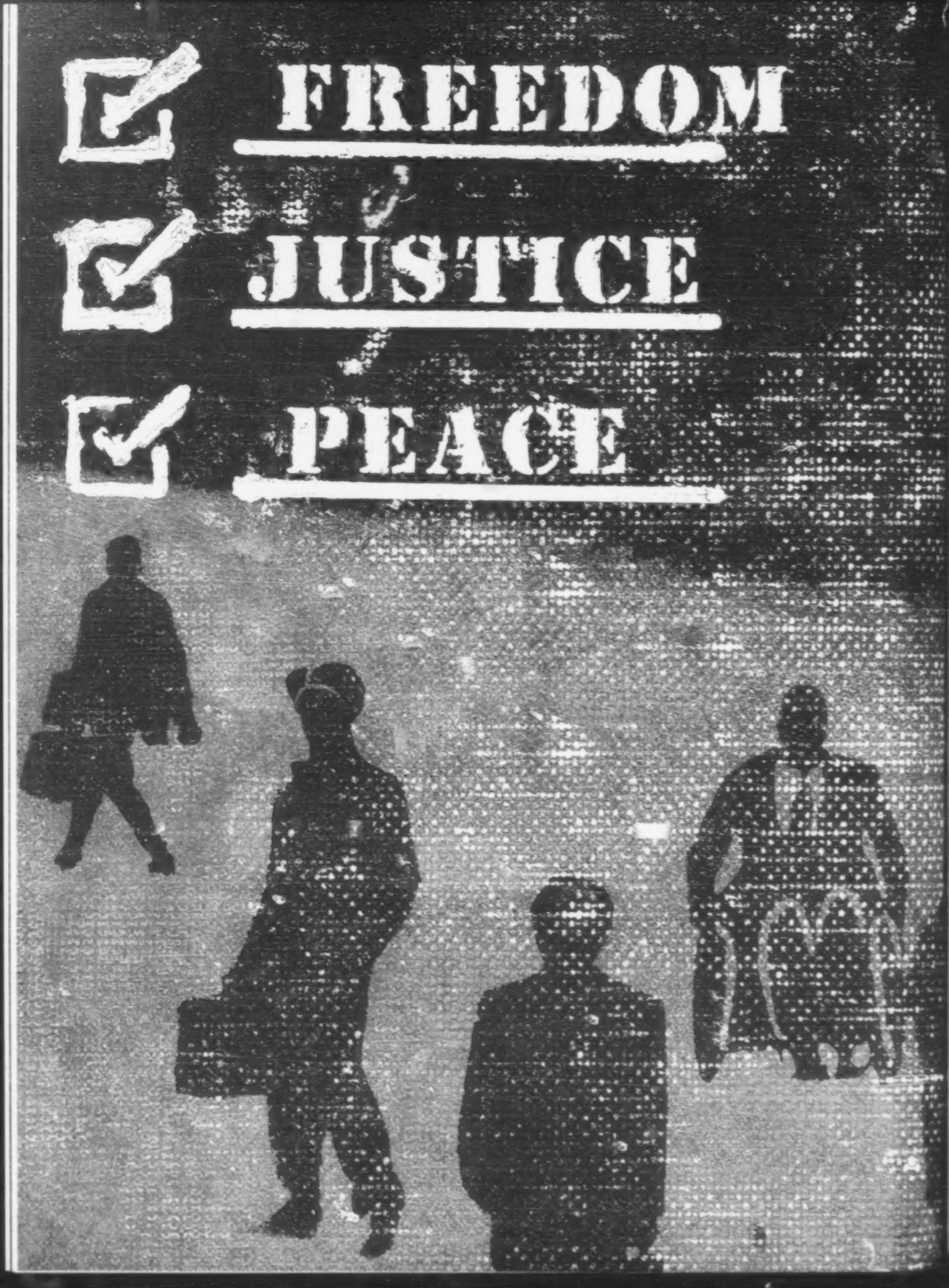
655 Bay Street
Toronto, ON M7A 1T7
Phone: (416) 326-7731
Fax: (416) 326-7775

Publications Ontario

880 Bay Street, 5th floor
Toronto, Ontario
M7A 1N8
Phone: (416) 326-5300
Toll Free: 1-800-668-9938
TTY: (416) 965-5130
Toll Free TTY: 1-800-268-7095
Fax: (416) 326-5317

POOL – Publications Ontario On-Line

Internet: www.gov.on.ca/MBS/english/publications/howto/index.html



☑ FREEDOM
☑ JUSTICE
☑ PEACE

THE ONTARIO HUMAN RIGHTS CODE

☑ FREEDOM
☑ JUSTICE
☑ PEACE

THE ONTARIO HUMAN RIGHTS CODE

Revised Statutes of Ontario, 1990, Chapter H.9

© Queen's Printer for Ontario, 2003

This is an unofficial version of Government of Ontario legal materials.

Amended by: 1993, c. 27, Sched.; 1993, c. 35, s. 56; 1994, c. 10, s. 22; 1994, c. 27, s. 65; 1995, c. 4, s. 3; 1997, c. 16, s. 8; 1997, c. 24, s. 212; 1999, c. 6, s. 28; 2001, c. 13, s. 19; 2001, c. 32, s. 27; 2002, c. 18, Sched. C.

Preamble - *Whereas recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;*

And Whereas it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

And Whereas these principles have been confirmed in Ontario by a number of enactments of the Legislature and it is desirable to revise and extend the protection of human rights in Ontario;

Therefore, Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PART I - FREEDOM FROM DISCRIMINATION

1. Services

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability. R.S.O. 1990, c. H.19, s. 1; 1999, c. 6, s. 28 (1); 2001, c. 32, s. 27 (1).

2. (1) Accommodation

Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2 (1); 1999, c. 6, s. 28 (2); 2001, c. 32, s. 27 (1).

2. (2) Harassment in accommodation

Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2 (2); 1999, c. 6, s. 28 (3); 2001, c. 32, s. 27 (1).

3. Contracts

Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability. R.S.O. 1990, c. H.19, s. 3; 1999, c. 6, s. 28 (4); 2001, c. 32, s. 27 (1).

4. (1) Accommodation of person under eighteen

Every sixteen or seventeen year old person who has withdrawn from parental control has a right to equal treatment with respect to occupancy of and contracting for accommodation without discrimination because the person is less than eighteen years old. R.S.O. 1990, c. H.19, s. 4 (1).

4. (2) Idem

A contract for accommodation entered into by a sixteen or seventeen year old person who has withdrawn from parental control is enforceable against that person as if the person were eighteen years old. R.S.O. 1990, c. H.19, s. 4 (2).

5. (1) Employment

Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (1); 1999, c. 6, s. 28 (5); 2001, c. 32, s. 27 (1).

5. (2) Harassment in employment

Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, same-sex partnership status, family status or disability. R.S.O. 1990, c. H.19, s. 5 (2); 1999, c. 6, s. 28 (6); 2001, c. 32, s. 27 (1).

6. Vocational associations

Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status or disability. R.S.O. 1990, c. H.19, s. 6; 1999, c. 6, s. 28 (7); 2001, c. 32, s. 27 (1).

7. (1) Harassment because of sex in accommodation

Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or agent of the landlord or by an occupant of the same building. R.S.O. 1990, c. H.19, s. 7 (1).

7. (2) Harassment because of sex in workplaces

Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee. R.S.O. 1990, c. H.19, s. 7 (2).

7. (3) Sexual solicitation by a person in position to confer benefit, etc.

Every person has a right to be free from,

(a) a sexual solicitation or advance made by a person in a position to confer, grant or deny a benefit or advancement to the person where the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(b) a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person. R.S.O. 1990, c. H.19, s. 7 (3).

8. Reprisals

Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing. R.S.O. 1990, c. H.19, s. 8.

9. Infringement prohibited

No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. R.S.O. 1990, c. H.19, s. 9.

PART II - INTERPRETATION AND APPLICATION

10. (1) Definitions re: Parts I and II

In Part I and in this Part,

"age" means an age that is eighteen years or more, except in subsection 5 (1) where "age" means an age that is eighteen years or more and less than sixty-five years; ("âge") "disability" means,

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*; (*"handicap"*)

"equal" means subject to all requirements, qualifications and considerations that are not a prohibited ground of discrimination; ("égal")

"family status" means the status of being in a parent and child relationship; ("état familial")

"group insurance" means insurance whereby the lives or well-being or the lives and well-being of a number of persons are insured severally under a single contract between an insurer and an association or an employer or other person; ("assurance-groupe")

"harassment" means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome; ("harcèlement")

"marital status" means the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage; ("état matrimonial")

"record of offences" means a conviction for,

(a) an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or

(b) an offence in respect of any provincial enactment; ("casier judiciaire")

"same-sex partner" means the person with whom a person of the same sex is living in a conjugal relationship outside marriage; ("partenaire de même sexe")

"same-sex partnership status" means the status of living with a person of the same sex in a conjugal relationship outside marriage; ("partenariat avec une personne de même sexe")

"services" does not include a levy, fee, tax or periodic payment imposed by law; ("services")

"spouse" means the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage. ("conjoint") R.S.O. 1990, c. H.19, s. 10 (1); 1993, c. 27, Sched.; 1997, c. 16, s. 8; 1999, c. 6, s. 28 (8); 2001, c. 13, s. 19; 2001, c. 32, s. 27 (2, 3).

10. (2) Pregnancy

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant. R.S.O. 1990, c. H.19, s. 10 (2).

10. (3) Past and presumed disabilities

The right to equal treatment without discrimination because of disability includes the right to equal treatment without discrimination because a person has or has had a disability or is believed to have or to have had a disability. 2001, c. 32, s. 27 (4).

11. (1) Constructive discrimination

A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. R.S.O. 1990, c. H.19, s. 11 (1).

11. (2) Idem

The Commission, the Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 11 (2); 1994, c. 27, s. 65 (1); 2002, c. 18, Sched. C, s. 2 (1).

11. (3) Idem

The Commission, the Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. R.S.O. 1990, c. H.19, s. 11 (3); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 2 (2).

12. Discrimination because of association

A right under Part I is infringed where the discrimination is because of relationship, association or dealings with a person or persons identified by a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 12.

13. (1) Announced intention to discriminate

A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I. R.S.O. 1990, c. H.19, s. 13 (1).

13. (2) Opinion

Subsection (1) shall not interfere with freedom of expression of opinion. R.S.O. 1990, c. H.19, s. 13 (2).

14. (1) Special programs

A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I. R.S.O. 1990, c. H.19, s. 14 (1).

14. (2) Review by Commission

The Commission may,

(a) upon its own initiative;

(b) upon application by a person seeking to implement a special program under the protection of subsection (1); or

(c) upon a complaint in respect of which the protection of subsection (1) is claimed, inquire into the special program and, in the discretion of the Commission, may by order declare,

(d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or

(e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1). R.S.O. 1990, c. H.19, s. 14 (2).

14. (3) Reconsideration

A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 37, with necessary modifications, applies. R.S.O. 1990, c. H.19, s. 14 (3).

14. (4) Effect of order

Subsection (1) does not apply to a special program where an order is made under clause (2) (d) or where an order is made under clause (2) (e) with modifications of the special program that are not implemented. R.S.O. 1990, c. H.19, s. 14 (4).

14. (5) Subs. (2) does not apply to Crown

Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown. R.S.O. 1990, c. H.19, s. 14 (5).

14.1 REPEALED: 1995, c. 4, s. 3 (1).

15. Age sixty-five or over

A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment. R.S.O. 1990, c. H.19, s. 15.

16. (1) Canadian Citizenship

A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship is a requirement, qualification or consideration imposed or authorized by law. R.S.O. 1990, c. H.19, s. 16 (1).

16. (2) Idem

A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or lawful admission to Canada for permanent residence is a requirement, qualification or consideration adopted for the purpose of fostering and developing participation in cultural, educational, trade union or athletic activities by Canadian citizens or persons lawfully admitted to Canada for permanent residence. R.S.O. 1990, c. H.19, s. 16 (2).

16. (3) Idem

A right under Part I to non-discrimination because of citizenship is not infringed where Canadian citizenship or domicile in Canada with the intention to obtain Canadian citizenship is a requirement, qualification or consideration adopted by an organization or enterprise for the holder of chief or senior executive positions. R.S.O. 1990, c. H.19, s. 16 (3).

17. (1) Disability

A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability. R.S.O. 1990, c. H.19, s. 17 (1); 2001, c. 32, s. 27 (5).

17. (2) Accommodation

The Commission, the Tribunal or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 17 (2); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 3 (1).

17. (3) Idem

The Commission, the Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. R.S.O. 1990, c. H.19, s. 17 (3); 1994, c. 27, s. 65 (2); 2002, c. 18, Sched. C, s. 3 (2).

17. (4) Powers of Commission

Where, after the investigation of a complaint, the Commission determines that the evidence does not warrant the subject-matter of the complaint being referred to the Tribunal because of the application of subsection (1), the Commission may nevertheless use its best endeavours to effect a settlement as to the duties or requirements. R.S.O. 1990, c. H.19, s. 17 (4); 1994, c. 27, s. 65 (3); 2002, c. 18, Sched. C, s. 1.

18. Special interest organizations

The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified. R.S.O. 1990, c. H.19, s. 18.

19. (1) Separate school rights preserved

This Act shall not be construed to adversely affect any right or privilege respecting separate schools enjoyed by separate school boards or their supporters under the *Constitution Act, 1867* and the *Education Act*. R.S.O. 1990, c. H.19, s. 19 (1).

19. (2) Duties of teachers

This Act does not apply to affect the application of the *Education Act* with respect to the duties of teachers. R.S.O. 1990, c. H.19, s. 19 (2).

20. (1) Restriction of facilities by sex

The right under section 1 to equal treatment with respect to services and facilities without discrimination because of sex is not infringed where the use of the services or facilities is restricted to persons of the same sex on the ground of public decency. R.S.O. 1990, c. H.19, s. 20 (1).

20. (2) Minimum drinking age

The right under section 1 to equal treatment with respect to services, goods and facilities without discrimination because of age is not infringed by the provisions of the *Liquor Licence Act* and the regulations under it relating to providing for and enforcing a minimum drinking age of nineteen years. R.S.O. 1990, c. H.19, s. 20 (2).

20. (3) Recreational clubs

The right under section 1 to equal treatment with respect to services and facilities is not infringed where a recreational club restricts or qualifies access to its services or facilities or gives preferences with respect to membership dues and other fees because of age, sex, marital status, same-sex partnership status or family status. R.S.O. 1990, c. H.19, s. 20 (3); 1999, c. 6, s. 28 (9).

20. (4) Tobacco and young persons

The right under section 1 to equal treatment with respect to goods without discrimination because of age is not infringed by the provisions of the *Tobacco Control Act, 1994* and the regulations under it relating to selling or supplying tobacco to persons who are, or who appear to be, under the age of 19 years. 1994, c. 10, s. 22.

21. (1) Shared accommodation

The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed by discrimination where the residential accommodation is in a dwelling in which the owner or his or her family reside if the occupant or occupants of the residential accommodation are required to share a bathroom or kitchen facility with the owner or family of the owner. R.S.O. 1990, c. H.19, s. 21 (1).

21. (2) Restrictions on accommodation, sex

The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination because of sex is not infringed by discrimination on that ground where the occupancy of all the residential accommodation in the building, other than the accommodation, if any, of the owner or family of the owner, is restricted to persons who are of the same sex. R.S.O. 1990, c. H.19, s. 21 (2).

21. (3) Prescribing business practices

The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed if a landlord uses in the manner prescribed under this Act income information, credit checks, credit references, rental history, guarantees or other similar business practices which are prescribed in the regulations made under this Act in selecting prospective tenants. 1997, c. 24, s. 212 (1).

22. Restrictions for insurance contracts, etc.

The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, same-sex partnership status, family status or disability, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, same-sex partnership status, family status or disability. R.S.O. 1990, c. H.19, s. 22; 1999, c. 6, s. 28 (10); 2001, c. 32, s. 27 (5).

23. (1) Employment

The right under section 5 to equal treatment with respect to employment is infringed where an invitation to apply for employment or an advertisement in connection with employment is published or displayed that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 23 (1).

23. (2) Application for employment

The right under section 5 to equal treatment with respect to employment is infringed where a form of application for employment is used or a written or oral inquiry is made of an applicant that directly or indirectly classifies or indicates qualifications by a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 23 (2).

23. (3) Questions at interview

Nothing in subsection (2) precludes the asking of questions at a personal employment interview concerning a prohibited ground of discrimination where discrimination on such ground is permitted under this Act. R.S.O. 1990, c. H.19, s. 23 (3).

23. (4) Employment agencies

The right under section 5 to equal treatment with respect to employment is infringed where an employment agency discriminates against a person because of a prohibited ground of discrimination in receiving, classifying, disposing of or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or agent of an employer. R.S.O. 1990, c. H.19, s. 23 (4).

24. (1) Special employment

The right under section 5 to equal treatment with respect to employment is not infringed where,

(a) a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by their race, ancestry, place of origin, colour, ethnic origin, creed, sex, age, marital status, same-sex partnership status or disability employs only, or gives preference in employment to, persons similarly identified if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment;

(b) the discrimination in employment is for reasons of age, sex, record of offences, marital status or same-sex partnership status if the age, sex, record of offences, marital status or same-sex partnership status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

(c) an individual person refuses to employ another for reasons of any prohibited ground of discrimination in section 5, where the primary duty of the employment is attending to the medical or personal needs of the person or of an ill child or an aged, infirm or ill spouse, same-sex partner or relative of the person; or

(d) an employer grants or withholds employment or advancement in employment to a person who is the spouse, same-sex partner, child or parent of the employer or an employee. R.S.O. 1990, c. H.19, s. 24 (1); 1999, c. 6, s. 28 (11); 2001, c. 32, s. 27 (5).

24. (2) Reasonable accommodation

The Commission, the Tribunal or a court shall not find that a qualification under clause (1) (b) is reasonable and *bona fide* unless it is satisfied that the circumstances of the person cannot be accommodated without undue hardship on the person responsible for accommodating those circumstances considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c. H.19, s. 24 (2); 1994, c. 27, s. 65 (4); 2002, c. 18, Sched. C, s. 4 (1).

24. (3) Idem

The Commission, the Tribunal or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship. R.S.O. 1990, c. H.19, s. 24 (3); 1994, c. 27, s. 65 (4); 2002, c. 18, Sched. C, s. 4 (2).

24.1 REPEALED: 1995, c. 4, s. 3 (2).

25. (1) Employee benefit and pension plans

The right under section 5 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer, that makes a distinction, preference or exclusion on a prohibited ground of discrimination. R.S.O. 1990, c. H.19, s. 25 (1).

25. (2) Same

The right under section 5 to equal treatment with respect to employment without discrimination because of age, sex, marital status, same-sex partnership status or family status is not infringed by an employee superannuation or pension plan or fund or a contract of group insurance between an insurer and an employer that complies with the *Employment Standards Act* and the regulations thereunder. R.S.O. 1990, c. H.19, s. 25 (2); 1999, c. 6, s. 28 (12).

25. (3) Same

The right under section 5 to equal treatment with respect to employment without discrimination because of disability is not infringed,

(a) where a reasonable and *bona fide* distinction, exclusion or preference is made in an employee disability or life insurance plan or benefit because of a pre-existing disability that substantially increases the risk;

(b) where a reasonable and *bona fide* distinction, exclusion or preference is made on the ground of a pre-existing disability in respect of an employee-pay-all or participant-pay-all benefit in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer or in respect of a plan, fund or policy that is offered by an employer to employees if they are fewer than twenty-five in number. R.S.O. 1990, c. H.19, s. 25 (3); 2001, c. 32, s. 27 (5).

25. (4) Compensation

An employer shall pay to an employee who is excluded because of a disability from an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and the employer compensation equivalent to the contribution that the employer would make thereto on behalf of an employee who does not have a disability. R.S.O. 1990, c. H.19, s. 25 (4); 2001, c. 32, s. 27 (5).

26. (1) Discrimination in employment under government contracts

It shall be deemed to be a condition of every contract entered into by or on behalf of the Crown or any agency thereof and of every subcontract entered into in the performance thereof that no right under section 5 will be infringed in the course of performing the contract. R.S.O. 1990, c. H.19, s. 26 (1).

26. (2) Idem: government grants and loans

It shall be deemed to be a condition of every grant, contribution, loan or guarantee made by or on behalf of the Crown or any agency thereof that no right under section 5 will be infringed in the course of carrying out the purposes for which the grant, contribution, loan or guarantee was made. R.S.O. 1990, c. H.19, s. 26 (2).

26. (3) Sanction

Where an infringement of a right under section 5 is found by the Tribunal upon a complaint and constitutes a breach of a condition under this section, the breach of condition is sufficient grounds for cancellation of the contract, grant, contribution, loan or guarantee and refusal to enter into any further contract with or make any further grant, contribution, loan or guarantee to the same person. R.S.O. 1990, c. H.19, s. 26 (3); 2002, c. 18, Sched. C, s. 5.

PART III - THE ONTARIO HUMAN RIGHTS COMMISSION

27. (1) The Commission

The Ontario Human Rights Commission is continued under the name Ontario Human Rights Commission in English and Commission ontarienne des droits de la personne in French and shall be composed of such persons, being not fewer than seven, as are appointed by the Lieutenant Governor in Council. R.S.O. 1990, c. H.19, s. 27 (1).

27. (2) Responsible to Minister

The Commission is responsible to the Minister for the administration of this Act. R.S.O. 1990, c. H.19, s. 27 (2).

27. (3) Chair

The Lieutenant Governor in Council shall designate a member of the Commission as chair, and a member as vice-chair. R.S.O. 1990, c. H.19, s. 27 (3).

27. (4) Remuneration

The Lieutenant Governor in Council may fix the remuneration and allowance for expenses of the chair, vice-chair and members of the Commission. R.S.O. 1990, c. H.19, s. 27 (4).

27. (5) Employees

The employees of the Commission shall be appointed under the *Public Service Act*. R.S.O. 1990, c. H.19, s. 27 (5).

27. (6) Divisions

The Commission may authorize any function of the Commission to be performed by a division of the Commission composed of at least three members of the Commission. R.S.O. 1990, c. H.19, s. 27 (6).

28. (1) Race relations division

The Lieutenant Governor in Council shall designate at least three members of the Commission to constitute a race relations division of the Commission and shall designate one member of the race relations division as Commissioner for Race Relations. R.S.O. 1990, c. H.19, s. 28 (1).

28. (2) Functions

It is the function of the race relations division of the Commission to perform any of the functions of the Commission under clause 29 (f), (g) or (h) relating to race, ancestry, place of origin, colour, ethnic origin or creed that are referred to it by the Commission and any other function referred to it by the Commission. R.S.O. 1990, c. H.19, s. 28 (2).

29. Function of Commission

It is the function of the Commission,

(a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;

(b) to promote an understanding and acceptance of and compliance with this Act;

(c) to recommend for consideration a special plan or program designed to meet the requirements of subsection 14 (1), subject to the right of a person aggrieved by the implementation of the plan or program to request the Commission to reconsider its recommendation and section 37 applies with necessary modifications;

(d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act;

(e) to examine and review any statute or regulation, and any program or policy made by or under a statute and make recommendations on any provision, program or policy, that in its opinion is inconsistent with the intent of this Act;

(f) to inquire into incidents of and conditions leading or tending to lead to tension or conflict based upon identification by a prohibited ground of discrimination and take appropriate action to eliminate the source of tension or conflict;

(g) to initiate investigations into problems based upon identification by a prohibited ground of discrimination that may arise in a community, and encourage and coordinate plans, programs and activities to reduce or prevent such problems;

(h) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination;

(i) to enforce this Act and orders of the Tribunal;

(j) to perform the functions assigned to it by this or any other Act. R.S.O. 1990, c. H.19, s. 29; 1994, c. 27, s. 65 (6); 2002, c. 18, Sched. C, s. 1.

30. (1) Evidence obtained in course of investigation

No person who is a member of the Commission shall be required to give testimony in a civil suit or any proceeding as to information obtained in the course of an investigation under this Act. R.S.O. 1990, c. H.19, s. 30 (1).

30. (2) Idem

No person who is employed in the administration of this Act shall be required to give testimony in a civil suit or any proceeding other than a proceeding under this Act as to information obtained in the course of an investigation under this Act. R.S.O. 1990, c. H.19, s. 30 (2).

31. (1) Annual report

The Commission shall make a report to the Minister not later than the 30th day of June in each year upon the affairs of the Commission during the year ending on the 31st day of March of that year. R.S.O. 1990, c. H.19, s. 31 (1).

31. (2) Idem

The Minister shall submit the report to the Lieutenant Governor in Council who shall cause the report to be laid before the Assembly if it is in session, or, if not, at the next session. R.S.O. 1990, c. H.19, s. 31 (2).

PART IV – ENFORCEMENT

32. (1) Complaints

Where a person believes that a right of the person under this Act has been infringed, the person may file with the Commission a complaint in a form approved by the Commission. R.S.O. 1990, c. H.19, s. 32 (1).

32. (2) Idem

The Commission may initiate a complaint by itself or at the request of any person. R.S.O. 1990, c. H.19, s. 32 (2).

32. (3) Combining of complaints

Where two or more complaints,

(a) bring into question a practice of infringement engaged in by the same person; or

(b) have questions of law or fact in common,

the Commission may combine the complaints and deal with them in the same proceeding. R.S.O. 1990, c. H.19, s. 32 (3).

33. (1) Investigation of complaints

Subject to section 34, the Commission shall investigate a complaint and endeavour to effect a settlement. R.S.O. 1990, c. H.19, s. 33 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (1) is repealed by the Statutes of Ontario, 1994, chapter 27, subsection 65 (7) and the following substituted:

33. (1) Investigation of complaints

Subject to section 34, the Commission shall investigate a complaint and may endeavour to effect a settlement.

See: 1994, c. 27, ss. 65 (7), 66 (1).

33. (2) Investigation

An investigation by the Commission may be made by a member or employee of the Commission who is authorized by the Commission for the purpose. R.S.O. 1990, c. H.19, s. 33 (2).

33. (3) Powers on investigation

A person authorized to investigate a complaint may,

(a) enter any place, other than a place that is being used as a dwelling, at any reasonable time, for the purpose of investigating the complaint;

(b) request the production for inspection and examination of documents or things that are or may be relevant to the investigation;

(c) upon giving a receipt therefor, remove from a place documents produced in response to a request under clause (b) for the purpose of making copies thereof or extracts therefrom and shall promptly return them to the person who produced or furnished them; and

(d) question a person on matters that are or may be relevant to the complaint subject to the person's right to have counsel or a personal representative present during such questioning, and may exclude from the questioning any person who may be adverse in interest to the complainant. R.S.O. 1990, c. H.19, s. 33 (3).

33. (4) Entry into dwellings

A person investigating a complaint shall not enter a place that is being used as a dwelling without the consent of the occupier except under the authority of a warrant issued under subsection (8). R.S.O. 1990, c. H.19, s. 33 (4).

33. (5) Denial of entry

Subject to subsection (4), if a person who is or may be a party to a complaint denies entry to any place, or instructs the person investigating to leave the place, or impedes or prevents an investigation therein, the Commission may refer the matter to the Tribunal or may authorize an employee or member to apply to a justice of the peace for a warrant to enter under subsection (8). R.S.O. 1990, c. H.19, s. 33 (5); 1994, c. 27, s. 65 (8); 2002, c. 18, Sched. C, s. 1.

33. (6) Refusal to produce

If a person refuses to comply with a request for production of documents or things, the Commission may refer the matter to the Tribunal, or may authorize an employee or member to apply to a justice of the peace for a search warrant under subsection (7). R.S.O. 1990, c. H.19, s. 33 (6); 1994, c. 27, s. 65 (9); 2002, c. 18, Sched. C, s. 1.

33. (7) Warrant for search

Where a justice of the peace is satisfied on evidence upon oath or affirmation that there are in a place documents that there is reasonable ground to believe will afford evidence relevant to the complaint, he or she may issue a warrant in the prescribed form authorizing a person named in the warrant to search a place for any such documents, and to remove them for the purposes of making copies thereof or extracts therefrom, and the documents shall be returned promptly to the place from which they were removed. R.S.O. 1990, c. H.19, s. 33 (7).

33. (8) Warrant for entry

Where a justice of the peace is satisfied by evidence upon oath or affirmation that there is reasonable ground to believe it is necessary that a place being used as a dwelling or to which entry has been denied be entered to investigate a complaint, he or she may issue a warrant in the prescribed form authorizing such entry by a person named in the warrant. R.S.O. 1990, c. H.19, s. 33 (8).

33. (9) Execution of warrant

A warrant issued under subsection (7) or (8) shall be executed at reasonable times as specified in the warrant. R.S.O. 1990, c. H.19, s. 33 (9).

33. (10) Expiration of warrant

Every warrant shall name a date on which it expires, which shall be a date not later than fifteen days after it is issued. R.S.O. 1990, c. H.19, s. 33 (10).

33. (11) Obstruction

No person shall hinder, obstruct or interfere with a person in the execution of a warrant or otherwise impede an investigation under this Act. R.S.O. 1990, c. H.19, s. 33 (11).

33. (12) Idem

Subsection (11) is not contravened by a refusal to comply with a request for the production of documents or things made under clause (3) (b). R.S.O. 1990, c. H.19, s. 33 (12).

33. (13) Admissibility of copies

Copies of, or extracts from, documents removed from premises under clause (3) (c) or subsection (7) certified as being true copies of the originals by the person who made them, are admissible in evidence to the same extent as, and have the same evidentiary value as, the documents of which they are copies or extracts. R.S.O. 1990, c. H.19, s. 33 (13).

34. (1) Decision to not deal with complaint

Where it appears to the Commission that,

(a) the complaint is one that could or should be more appropriately dealt with under an Act other than this Act;

(b) the subject-matter of the complaint is trivial, frivolous, vexatious or made in bad faith;

(c) the complaint is not within the jurisdiction of the Commission; or

(d) the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay, the Commission may, in its discretion, decide to not deal with the complaint. R.S.O. 1990, c. H.19, s. 34 (1).

34. (2) Notice of decision and reasons

Where the Commission decides to not deal with a complaint, it shall advise the complainant in writing of the decision and the reasons therefor and of the procedure under section 37 for having the decision reconsidered. R.S.O. 1990, c. H.19, s. 34 (2).

35. (1) Human Rights Tribunal of Ontario

The Tribunal established under this section as it read immediately before the day the *Government Efficiency Act, 2002* receives Royal Assent is continued under the name Human Rights Tribunal of Ontario in English and Tribunal des droits de la personne de l'Ontario in French and shall be composed of such members as are appointed by the Lieutenant Governor in Council. 2002, c. 18, Sched. C, s. 6.

35. (2) Remuneration

The members of the Tribunal shall be paid such allowances and expenses as are fixed by the Lieutenant Governor in Council. 1994, c. 27, s. 65 (10); 2002, c. 18, Sched. C, s. 1.

35. (3) Chair, vice-chair

The Lieutenant Governor in Council shall appoint a chair and may appoint one or more vice-chairs of the Tribunal from among the members of the Tribunal. 1994, c. 27, s. 65 (10); 2002, c. 18, Sched. C, s. 1.

35. (4) Employees

Such employees as are considered necessary for the proper conduct of the Tribunal may be appointed under the *Public Service Act*. 1994, c. 27, s. 65 (10); 2002, c. 18, Sched. C, s. 1.

35. (5) Rules

The Tribunal may make rules regulating its practice and procedure and generally for the conduct and management of its affairs and such rules are not regulations within the meaning of the *Regulations Act*. 1994, c. 27, s. 65 (10); 2002, c. 18, Sched. C, s. 1.

35. (6) Panels

The chair of the Tribunal may appoint panels composed of one or more members of the Tribunal to hold hearings in the place of the full Tribunal wherever the Tribunal is required to hold a hearing under this Act and, where a panel holds a hearing, the panel has all the powers and duties, except the power in subsection (5), given to the Tribunal under this Act. 1994, c. 27, s. 65 (10); 2002, c. 18, Sched. C, s. 1.

35. (7) Person designated to preside over panel

The chair of the Tribunal shall designate one member of each panel to preside over the panel's hearings. 1994, c. 27, s. 65 (10); 2002, c. 18, Sched. C, s. 1.

35. (8) Reassignment of panel

Where a panel of the Tribunal is unable for any reason to exercise the powers under section 39 or 41, the chair of the Tribunal may assign another panel in its place. 1994, c. 27, s. 65 (10); 2002, c. 18, Sched. C, s. 1.

Note: Any hearing commenced by a Tribunal (formerly known as a "board of inquiry") appointed under this Code, as it read immediately before April 17, 1995, may be continued to its conclusion as if section 35 had not been re-enacted by the Statutes of Ontario, 1994, chapter 27, subsection 65 (10). See: 1994, c. 27, s. 65 (10, 11).

36. (1) Referred to Tribunal

Where the Commission does not effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may refer the subject-matter of the complaint to the Tribunal. 1994, c. 27, s. 65 (12); 2002, c. 18, Sched. C, s. 1.

36. (2) Notice of decision not to refer to Tribunal

Where the Commission decides to not refer the subject-matter of a complaint to the Tribunal, it shall advise the complainant and the person complained against in writing of the decision and the reasons therefor and inform the complainant of the procedure under section 37 for having the decision reconsidered. R.S.O. 1990, c. H.19, s. 36 (2); 1994, c. 27, s. 65 (13); 2002, c. 18, Sched. C, s. 1.

37. (1) Reconsideration

Within a period of fifteen days of the date of mailing the decision and reasons therefor mentioned in subsection 34 (2) or subsection 36 (2), or such longer period as the Commission may for special reasons allow, a complainant may request the Commission to reconsider its decision by filing an application for reconsideration containing a concise statement of the material facts upon which the application is based. R.S.O. 1990, c. H.19, s. 37 (1).

37. (2) Notice of application

Upon receipt of an application for reconsideration the Commission shall as soon as is practicable notify the person complained against of the application and afford the person an opportunity to make written submissions with respect thereto within such time as the Commission specifies. R.S.O. 1990, c. H.19, s. 37 (2).

37. (3) Decision

Every decision of the Commission on reconsideration together with the reasons therefor shall be recorded in writing and promptly communicated to the complainant and the person complained against and the decision shall be final. R.S.O. 1990, c. H.19, s. 37 (3).

38. REPEALED: 1994, c. 27, s. 65 (14).

39. (1) Hearing by Tribunal

The Tribunal shall hold a hearing,

(a) to determine whether a right of the complainant under this Act has been infringed;

(b) to determine who infringed the right; and

(c) to decide upon an appropriate order under section 41,

and the hearing shall be commenced within thirty days after the date on which the subject-matter of the complaint was referred to the Tribunal. R.S.O. 1990, c. H.19, s. 39 (1); 1994, c. 27, s. 65 (15); 2002, c. 18, Sched. C, s. 1.

39. (2) Parties

The parties to a proceeding before the Tribunal are,

(a) the Commission, which shall have the carriage of the complaint;

(b) the complainant;

(c) any person who the Commission alleges has infringed the right;

(d) any person appearing to the Tribunal to have infringed the right;

(e) where the complaint is of alleged conduct constituting harassment under subsection 2 (2) or subsection 5 (2) or of alleged conduct under section 7, any person who, in the opinion of the Tribunal, knew or was in possession of facts from which the person ought reasonably to have known of the conduct and who had authority to penalize or prevent the conduct. R.S.O. 1990, c. H.19, s. 39 (2); 1994, c. 27, s. 65 (16); 2002, c. 18, Sched. C, s. 1.

39. (3) Adding parties

A party may be added by the Tribunal under clause (2) (d) or clause (2) (e) at any stage of the proceeding upon such terms as the Tribunal considers proper. R.S.O. 1990, c. H.19, s. 39 (3); 2002, c. 18, Sched. C, s. 1.

39. (4) Adjournment on production

Where the Tribunal exercises its power under clause 12 (1) (b) of the *Statutory Powers Procedure Act* to issue a summons requiring the production in evidence of documents or things, it may, upon the production of the documents or things before it, adjourn the proceedings to permit the parties to examine the documents or things. R.S.O. 1990, c. H.19, s. 39 (4); 1994, c. 27, s. 65 (17); 2002, c. 18, Sched. C, s. 1.

39. (5) Adjournment for view

The Tribunal may, where it appears to be in the interests of justice, direct that the Tribunal and the parties and their counsel or representatives shall have a view of any place or thing, and may adjourn the proceedings for that purpose. R.S.O. 1990, c. H.19, s. 39 (5); 2002, c. 18, Sched. C, s. 1.

39. (6) Members at hearing not to have taken part in investigation, etc.

A member of the Tribunal hearing a complaint must not have taken part in any investigation or consideration of the subject-matter of the inquiry before the hearing and shall not communicate directly or indirectly in relation to the subject-matter of the inquiry with any person or with any party or any party's representative except upon notice to and opportunity for all parties to participate, but the Tribunal may seek legal advice from an adviser independent of the parties and in such case the nature of the advice shall be made known to the parties in order that they may make submissions as to the law. 1994, c. 27, s. 65 (18); 2002, c. 18, Sched. C, s. 1.

40. REPEALED: 1994, c. 27, s. 65 (19).

41. (1) Orders of Tribunals

Where the Tribunal, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the Tribunal may, by order,

(a) direct the party to do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and

(b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish. R.S.O. 1990, c. H.19, s. 41 (1); 2002, c. 18, Sched. C, s. 1.

41. (2) Order to prevent harassment

Where the Tribunal makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2 (2) or subsection 5 (2) or conduct under section 7, and the Tribunal finds that a person who is a party to the proceeding,

(a) knew or was in possession of knowledge from which the person ought to have known of the infringement; and

(b) had the authority by reasonably available means to penalize or prevent the conduct and failed to use it,

the Tribunal shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 36 (2), request the Tribunal to re-convene and if the Tribunal finds that a person who is a party to the proceeding,

(c) knew or was in possession of knowledge from which the person ought to have known of the repetition of infringement; and

(d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it,

the Tribunal may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right. R.S.O. 1990, c. H.19, s. 41 (2); 1994, c. 27, s. 65 (20); 2002, c. 18, Sched. C, s. 1.

41. (3) REPEALED: 1994, c. 27, s. 65 (21).

41. (4) Costs

Where, upon dismissing a complaint, the Tribunal finds that,

(a) the complaint was trivial, frivolous, vexatious or made in bad faith; or

(b) in the particular circumstances undue hardship was caused to the person complained against,

the Tribunal may order the Commission to pay to the person complained against such costs as are fixed by the Tribunal. R.S.O. 1990, c. H.19, s. 41 (4); 2002, c. 18, Sched. C, s. 1.

41. (5) Decision within 30 days

The Tribunal shall make its finding and decision within thirty days after the conclusion of its hearing. R.S.O. 1990, c. H.19, s. 41 (5); 2002, c. 18, Sched. C, s. 1.

41.1 REPEALED: 1995, c. 4, s. 3 (3).

42. (1) Appeal from decision of Tribunal

Any party to a proceeding before the Tribunal may appeal from a decision or order of the Tribunal to the Divisional Court in accordance with the rules of court. R.S.O. 1990, c. H.19, s. 42 (1); 1994, c. 27, s. 65 (23); 2002, c. 18, Sched. C, s. 1.

42. (2) Record to be filed in court

Where notice of an appeal is served under this section, the Tribunal shall forthwith file in the Divisional Court the record of the proceedings before it in which the decision or order appealed from was made and the record, together with a transcript of the oral evidence taken before the Tribunal if it is not part of the record of the Tribunal, shall constitute the record in the appeal. R.S.O. 1990, c. H.19, s. 42 (2); 2002, c. 18, Sched. C, s. 1.

42. (3) Powers of court

An appeal under this section may be made on questions of law or fact or both and the court may affirm or reverse the decision or order of the Tribunal or direct the Tribunal to make any decision or order that the Tribunal is authorized to make under this Act and the court may substitute its opinion for that of the Tribunal. R.S.O. 1990, c. H.19, s. 42 (3): 2002, c. 18, Sched. C, s. 1.

43. Settlements

Where a settlement of a complaint is agreed to in writing, signed by the parties and approved by the Commission, the settlement is binding upon the parties, and a breach of the settlement is grounds for a complaint under section 32, and this Part applies to the complaint in the same manner as if the breach of the settlement were an infringement of a right under this Act. R.S.O. 1990, c. H.19, s. 43.

44. (1) Penalty

Every person who contravenes section 9, subsection 33 (11), or an order of the Tribunal, is guilty of an offence and on conviction is liable to a fine of not more than $25,000. R.S.O. 1990, c. H.19, s. 44 (1); 1994, c. 27, s. 65 (23); 2002, c. 18, Sched. C, s. 1.

44. (2) Consent to prosecution

No prosecution for an offence under this Act shall be instituted except with the consent in writing of the Attorney General. R.S.O. 1990, c. H.19, s. 44 (2).

45. (1) Acts of officers, etc.

For the purposes of this Act, except subsection 2 (2), subsection 5 (2), section 7 and subsection 44 (1), any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization. R.S.O. 1990, c. H.19, s. 45 (1).

45. (2) Opinion re authority or acquiescence

At the request of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization, the Tribunal in its decision shall make known whether or not, in its opinion, an act or thing done or omitted to be done by an officer, official, employee or agent was done or omitted to be done with or without the authority or acquiescence of the corporation, trade union, trade or occupational association, unincorporated association or employers' organization, and the opinion does not affect the application of subsection (1). R.S.O. 1990, c. H.19, s. 45 (2); 1994, c. 27, s. 65 (23); 2002, c. 18, Sched. C, s. 1.

PART V – GENERAL

46. Definitions, general

In this Act,

"Commission" means the Ontario Human Rights Commission; ("Commission")

"Minister" means the member of the Executive Council to whom the powers and duties of the Minister under this Act are assigned by the Lieutenant Governor in Council; ("ministre")

"person" in addition to the extended meaning given it by the *Interpretation Act*, includes an employment agency, an employers' organization, an unincorporated association, a trade or occupational association, a trade union, a partnership, a municipality, a board of police commissioners established under the *Police Act*, being chapter 381 of the Revised Statutes of Ontario, 1980, and a police services board established under the *Police Services Act*; ("personne")

"Tribunal" means the Human Rights Tribunal of Ontario continued under section 35. ("Tribunal") R.S.O. 1990, c. H.19, s. 46; 1994, c. 27, s. 65 (24); 2002, c. 18, Sched. C, s. 7.

47. (1) Act binds Crown

This Act binds the Crown and every agency of the Crown. R.S.O. 1990, c. H.19, s. 47 (1).

47. (2) Act has primacy over other Acts

Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act. R.S.O. 1990, c. H.19, s. 47 (2).

48. Regulations

The Lieutenant Governor in Council may make regulations,

(a) prescribing standards for assessing what is undue hardship for the purposes of section 11, 17 or 24;

(a.1) prescribing the manner in which income information, credit checks, credit references, rental history, guarantees or other similar business practices may be used by a landlord in selecting prospective tenants without infringing section 2, and prescribing other similar business practices and the manner of their use, for the purposes of subsection 21 (3);

(b) prescribing forms and notices and providing for their use;

(c) prescribing time limits for the production of documents and things requested in an investigation under clause 33 (3) (b);

(d) prescribing procedures for carrying out an investigation under section 33;

(e) prescribing matters that the Commission shall consider in deciding whether or not to endeavour to effect a settlement under subsection 33 (1). R.S.O. 1990, c. H.19, s. 48; 1994, c. 27, s. 65 (25); 1997, c. 24, s. 212 (2).

FREEDOM
JUSTICE
PEACE

THE ONTARIO HUMAN RIGHTS CODE

BUSINESS PRACTICES PERMISSIBLE TO LANDLORDS IN SELECTING PROSPECTIVE TENANTS FOR RESIDENTIAL ACCOMMODATION, ONTARIO REGULATION 290/98

Amended to O. Reg. 646/00

1. (1) A landlord may request credit references and rental history information, or either of them, from a prospective tenant and may request from a prospective tenant authorization to conduct credit checks on the prospective tenant. O. Reg. 290/98, s. 1 (1).

(2) A landlord may consider credit references, rental history information and credit checks obtained pursuant to requests under subsection (1), alone or in any combination, in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly. O. Reg. 290/98, s. 1 (2).

(3) A landlord may request income information from a prospective tenant only if the landlord also requests information listed in subsection (1). O. Reg. 290/98, s. 1 (3).

(4) A landlord may consider income information about a prospective tenant in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly only if the landlord considers the income information together with all the other information that was obtained by the landlord pursuant to requests under subsection (1). O. Reg. 290/98, s. 1 (4).

(5) If, after requesting the information listed in subsections (1) and (3), a landlord only obtains income information about a prospective tenant, the landlord may consider the income information alone in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly. O. Reg. 290/98, s. 1 (5).

2. (1) A landlord may require a prospective tenant to obtain a guarantee for the rent. O. Reg. 90/98,s. 2

(2) A landlord may require a prospective tenant to pay a security deposit in accordance with sections 117 and 118 of the *Tenant Protection Act*, 1997. O. Reg. 290/98, s. 2 (2).

3. In selecting a prospective tenant, a landlord of a rental unit described in paragraph 1, 1.1, 2 or 3 of subsection 5 (1) or subsection 6 (1) of the *Tenant Protection Act*, 1997 may request and use income information about a prospective tenant in order to determine a prospective tenant's eligibility for rent in an amount geared-to-income and, when requesting and using the income information for that purpose only, the landlord is not bound by subsections 1 (3) and (4). O. Reg. 290/98, s. 3; O. Reg. 646/00, s. 1.

4. Nothing in this Regulation authorizes a landlord to refuse accommodation to any person because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, handicap or the receipt of public assistance. O. Reg. 290/98, s. 4; O. Reg. 31/00, s. 1.

FREEDOM
JUSTICE
PEACE

SEARCH AND ENTRY WARRANTS, REVISED REGULATIONS OF ONTARIO, 1990, REGULATION 642

Amended to O. Reg 22/92

1. A search warrant under subsection 33 (7) of the Act shall be in Form 1. R.R.O. 1990, Reg. 642, s. 1.
2. A warrant to enter under subsection 33 (8) of the Act shall be in Form 2. R.R.O. 1990, Reg. 642, s. 2.

APPENDIX "A" - SAMPLE APPLICATION FOR EMPLOYMENT

Position being applied for
Date available to begin work

PERSONAL DATA

Last name
Given name(s)

Address: Street
Apt. No.
Home Telephone Number

City
Province
Postal Code
Business Telephone Number

Are you legally eligible to work in Canada? ☐ Yes ☐ No

Are you 18 years or more and less than 65 years of age? ☐ Yes ☐ No

Are you willing to relocate in Ontario?
☐ Yes ☐ No
Preferred Location

To determine your qualification for employment, please provide below and on the reverse, information related to your academic and other achievements including volunteer work, as well as employment history. Additional information may be attached on a separate sheet.

EDUCATION

☐ SECONDARY SCHOOL
Highest grade or level completed
Name of program

☐ BUSINESS OR TRADE SCHOOL
Length of program

Licence, certificate or diploma awarded?
☐ Yes ☐ No
Type:

☐ COMMUNITY COLLEGE
Name of Program
Length of Program
Major subject

☐ UNIVERSITY
Diploma/Degree awarded
☐ Yes ☐ No ☐ Honours

Other courses, workshops, seminars
Licences, Certificates, Degrees

WORK RELATED SKILLS

Describe any of your work related skills, experience, or training that relate to the position being applied for.

EMPLOYMENT

Name of present/ last employer

Job title

Period of employment (includes leaves of absence related to maternity / parental leave, Workers' Compensation claims, disability, or human rights complaints)

From To

Type of Business

Reason for leaving (do not include leaves of absence related to maternity / parental leave, Workers' Compensation claims, disability, or human rights complaints)

Functions/Responsibilities

Name of previous employer

Job title

Period of employment (includes leaves of absence related to maternity / parental leave, Workers' Compensation claims, disability, or human rights complaints)

From To

Type of Business

Reason for leaving (do not include leaves of absence related to maternity / parental leave, Workers' Compensation claims, disability, or human rights complaints)

Functions/Responsibilities

Name of previous employer

Job title

Period of employment (includes leaves of absence related to maternity / parental leave, Workers' Compensation claims, disability, or human rights complaints)

From To

Type of Business

Reason for leaving (do not include leaves of absence related to maternity / parental leave, Workers' Compensation claims, disability, or human rights complaints)

Functions/Responsibilities

For employment references we may approach:

Your present/last employer?	☐ Yes	☐ No
Your former employer(s)?	☐ Yes	☐ No

List references if different than above on a separate sheet.

PERSONAL INTERESTS AND ACTIVITIES (civic, athletic etc.)

I hereby declare that the foregoing information is true and complete to my knowledge. I understand that a false statement may disqualify me from employment, or cause my dismissal.

Have you attached an additional sheet?

☐ Yes ☐ No

Signature Date

ENDNOTES

1 PREAMBLE

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and is in accord with the Universal Declaration of Human Rights as proclaimed by the United Nations;

AND WHEREAS it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

AND WHEREAS these principles have been confirmed in Ontario by a number of enactments of the Legislature
and it is desirable to revise and extend the protection of human rights in Ontario;

2 Subsection 47(2) of the *Code*.

3 *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

4 *Employment Standards Act 2000*, S.O. 1990, c. 41.

5 34.-(1) Where it appears to the Commission that,

> (a) the complaint is one that could or should be more appropriately dealt with under an *Act* other than this *Act*;
>
> …the Commission may, in its discretion, decide to not deal with the complaint.

6 *Ontario Labour Relations Act 1995*, S.O. 1995, c. 1, Sched. A.

7 *District of Parry Sound Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, 2003 SCC 42

8 *Supra*, note 6.

9 *Canada Labour Code*, R.S.C. 1985, c.L-2.

10 *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.

11 *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Schedule A.

12 Subsection 10(1) of the *Code*.

13 *Ontarians with Disabilities Act, 2001*, S.O. 2001, c. 32.

14 Please see the section entitled "Making the Workplace accessible for Persons with Disabilities" for further clarification. See also the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* and the "Submission of the Ontario Human Rights Commission Concerning Barrier-Free Access Requirements in the Ontario Building Code".

15 O. Reg. 403/97.

16 *Supra*, section 1.1.3.2.

17 Reliance on relevant building codes has been clearly rejected as a defence to a complaint of discrimination under the *Human Rights Code*. See *Quesnel v. London Educational Health Centre (1995)*, 28 C.H.R.R. D/474 (Ont. Board of Inq.)

18 *Supra*, note 13.

19 *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

20 *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56.

21 *Personal Information Protection and Electronic Documents Act*, S. C. 2000, c. 5.

22 *Constitution Act*, 1982, Part I.

23 In Reference Re *Public Service Employee Relations Act*, [1987] 1 S.C.R. 313; *Baker v. Canada (Minister of Citizenship and Immigration), [1999]* 2 S.C.R. 817

24 *Law v. Canada (Minister of Employment and Immigration*, [1999] 1 S.C.R. 497.

25 Section 12 of the *Code*.

26 Section 11 of the *Code*.

27 *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.

28 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868 at para. 20.

29 *British Columbia (Public Service Relations Commission) v. British Columbia Government and Service Employees Union* [1999] 3 S.C.R. 3 at para. 65.

30 Subsection 7(3) and section 8 of the *Code*.

31 Subsection 10(1) of the *Code*.

32 See the Commission's *Policy on Sexual Harassment and Inappropriate Gender-Related Comments and Conduct*.

33 Subsections 5(1) and 7(2) of the *Code*.

34 Subsection 7(3) of the *Code*.

35 *Lee v. T.J. Applebee's Food Conglomeration* (1988), 9 C.H.R.R. D/4781 (Ont. Bd. of Inq.).

36 See also the Commission's *Policy on Racial Slurs and Harassment and Racial Jokes*.

37 See also the Commission's *Policy on Discrimination and Harassment because of Sexual Orientation*.

38 Subsection 10(1) of the *Code*.

39 *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster Inc., Springfield, Mass., copyrighted 1989.

40 For further information, see the Commission's *Policy on Creed and the Accommodation of Religious Observances*.

41 *Ibid*.

42 See *Jazairi v. Ontario Human Rights Commission*, (1999) 36 C.H.R.R. D/1 (Ont. C.A.). The Court of Appeal ruled that creed does not include political opinions.

43 *Education Act*, R.S.O. 1990, c. E.2.

44 Section 19 of the *Code*.

45 Subsection 24(1)(a) of the *Code*.

46 *British Columbia College of Teachers v. Trinity Western*, (2001) 199 D.L.R. (4th) 1 (S.C.C.).

47 Subsection 10(1) of the *Code*.

48 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*, [2000] 1 S.C.C. 665.

49 Mental illness has been described as "significant clinical patterns of behaviour or emotions associated with some level of distress, suffering (pain, death), or impairment in one or more areas of functioning (school, work, social and family interactions). At the root of this impairment are symptoms of biological, psychological or behavioural dysfunction, or a combination of these." See Canadian Psychiatric Association, Mental Illness and Work (brochure), online: Canadian Psychiatric Association home page http://www.cpa-apc.org/MIAW/pamphlets/Work.asp at pg. 1.

50 Formerly the *Workers' Compensation Act*.

51 See also the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate*.

52 Subsection 10(1) of the Code.

53 In B. v. *Ontario Human Rights Commission*, 2002 SCC 66. Please see also the section entitled "Marital Status" for further clarification.

54 Protected under section 11 of the *Code*.

55 For more information on bona fide requirements, see the section entitled "Terms and Conditions of Employment – Designing a Job: Bona Fide Occupational Requirements".

56 Subsection 24(1)(d) of the *Code*.

57 In *B. v. Ontario Human Rights Commission*, supra, note 53.

58 See also the Commission's *Policy on Discrimination Because of Pregnancy and Breastfeeding*.

59 *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

60 *Ibid*.

61 An employer can refuse to hire someone based on pregnancy if it can be shown that this is reasonable, done in good faith and based on the nature of the job. However to benefit from this exception, the employer must show that the essential qualifications or requirements of the job cannot be changed or accommodated without creating undue hardship considering excessive costs or health and/or safety risks. For greater detail and clarification of bona fide requirements see the section entitled "Terms and Conditions of Employment-Designing a Job: Bona Fide Occupational Requirements".

62 Please note that subsection 25(2) of the *Code* permits group insurance contracts between employers and insurers to allow for differential treatment based on sex so long as they comply with the *Employment Standards Act* (ESA) and regulations. No provisions permitting differential treatment of health-related absences because of pregnancy during maternity leave have been included in the Regulations under the ESA. Under the Act and Regulations, employers are required to provide the same benefit entitlements to employees on pregnancy leave or parental leave as are provided to employees who are on other types of leave.

63 Please see the section entitled "Employee Benefits and Human Rights – Maternity Leave, Health-Related Absences and Related Benefits" for further clarification.

64 Subsection 10(1) of the *Code*.

65 Subsection 24(1)(b) of the *Code*.

66 Subsection 10(2) of the *Code*.

67 Subsection 24(1)(a) of the *Code*.

68 Subsection 24(1)(b) of the *Code*.

69 Subsection 24(1)(c) of the *Code*.

70 See also the Commission's *Policy on Discrimination and Harassment Because of Gender Identity*.

71 Persons who self-identify and live as the opposite gender, but have decided not to undergo sex-reassignment surgery.

72 Individuals who have a strong and persistent feeling that they are living in the wrong sex. This term is normally used to describe individuals who have undergone sex reassignment surgery.

73 Ontario Human Rights Commission, *Policy on Discrimination and Harassment Because of Sexual Orientation*.

74 Subsection 10(1) of the *Code* defines "marital status" as the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage.

75 Subsection 10(1) of the Code defines "spouse" as the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage.

76 *M. v. H.* [1999] 2 S.C.R. 3.

77 S.O. 1999, Chapter 6, proclaimed in force March 1, 2000.

78 Section 45 of the *Code*.

79 See the Commission's *Developing Procedures to Resolve Human Rights Complaints Within Your Organization*.

80 For more information, please refer to the section entitled "On the Job – Meeting the Needs of Employees: The Principle of Accommodation".

81 *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

82 *Ibid*.

83 *Gohm v. Domtar Inc.* (No.4) (1990), 12 C.H.R.R. D/161 (Ont. Bd. of Inq.), affirmed (sub nom. *Office & Professional Employees International Union, Local 267 v. Domtar Inc.*) (1992), 8 O.R. (3d) 65 (Div. Ct.).

84 Subsection 23(4) of the *Code*.

85 Section 3 of the *Code*.

86 Section 26(1) of the *Code*.

87 *Thambirajah v. Girl Guides of Canada* (1995), 26 C.H.R.R. D/1 (B.C. Council of Human Rights). The British Columbia Human Rights Council determined that a "large and liberal interpretation" of the provision prohibiting discrimination in employment would include the relationship between the complainant, a volunteer girl guide, and the respondent as an employment relationship. See also *Nixon v. Vancouver Rape Relief Society (No.2)* (2002) 42 C.H.R.R. D/20 (B.C. Human Rights Tribunal).

88 Section 11 of the *Code*.

89 *In British Columbia (Public Service Employee Relations Commission v. BCGSEU*, (known as "Meiorin") [1999] 3 S.C.R. 3, the Court considered whether a fitness test, which was found to indirectly discriminate against women, was a *bona fide* occupational requirement for a forest firefighter.

90 Please see the section entitled "On the Job" for a detailed discussion of accommodation and undue hardship.

91 Section 17 of the *Code*

92 There may be an exception if the employer is a special interest organization under subsection 24(1)(a) of the Code.

93 Subsection 24(1)(b) of the *Code*.

94 Subsection 24(1)(c) of the *Code*.

95 For further information see the Commission's *Guidelines on Special Programs*.

96 Subsection 23(1) of the *Code*.

97 Subsection 23(4) of the *Code*.

98 See the sample application form at Appendix "A" to this document. The sample application form is not intended to be exhaustive or prescriptive. Its purpose is to provide guidance to employers in designing their own employment application forms and in conducting interviews to reflect the intent and provisions of the *Code*.

99 Subsection 23(2) of the *Code*.

100 Please note that if an employee cannot travel or relocate because of a ground in the *Code*, such as family status, an employer may have the duty to accommodate this employee to the point of undue hardship.

101 *Ibid*.

102 *Ibid*.

103 *Ibid*.

104 See also the Commission's *Policy and Guidelines on Disability and the Duty to Accommodate; Policy on Creed and the Accommodation of Religious Observances, and Policy on Discrimination Because of Pregnancy and Breastfeeding*.

105 There may be situations where disability is an issue at an interview in which case the disability and accommodation measures may be discussed in relation to the essential duties of the job. Please see the section "Interviews: Disability" for further clarification.

106 Specifically, sections 14, 16 and 24.

107 Section 14 of the *Code*.

108 Subsection 24(1)(a) of the *Code*.

109 Subsection 24(1)(b) of the *Code*.

110 Subsection 16(1) of the *Code*.

111 Subsection 16(2) of the *Code*.

112 Subsection 16(3) of the *Code*.

113 Subsection 24(1)(a) of the *Code*.

114 Subsection 24(1)(a) of the *Code*.

115 Section 19 of the *Code*.

116 Subsection 24(1)(a) of the *Code*.

117 Subsection 24(1)(d) of the *Code*.

118 Subsection 24(1)(d) of the *Code*.

119 Subsection 24(1)(a) of the *Code*.

120 Subsection 24(1)(b) of the *Code*.

121 Subsection 24(1)(a) of the *Code*.

122 Subsection 24(1)(b) of the *Code*.

123 Subsection 24(1)(a) of the *Code*.

124 Subsection 24(1) of the *Code*.

125 Subsection 24 (1)(b) of the *Code*.

126 See the discussion of *bona fide* occupational requirements under the section "Designing a Job" for the test that will be applied to determine if a standard or requirement is justified.

127 *Ibid.*

128 For discussion of drug and alcohol testing on the job, please reference the section "On the Job – Drug and Alcohol Testing". See also the Commission's *Policy on Drug and Alcohol Testing*.

129 See *Drug and Alcohol Testing in the Workplace*, Report of the ILO Tripartite Experts Meeting (May 1993, Oslo, Norway), cited in Butler et al., *The Drug Testing Controversy: Imperial Oil and Other Lessons* (Carswell, Toronto: 1997) at 5.

130 *Entrop v. Imperial Oil Ltd.* (2000) 50 O.R. 3d 18 (C.A.).

131 Subsection 17(2) of the *Code*.

132 For a more detailed discussion, please see the *Policy and Guidelines on Disability* and the *Duty to Accommodate*, and the *Policy on Discrimination against Older Persons because of Age*.

133 See the earlier discussion under "Principles and Concepts - Making the Workplace Accessible for Persons with Disabilities" and "Terms and Conditions of Employment - Designing a Job- Inclusive Design"

134 Subsection 11(2) of the *Code*.

135 Subsections 17(2) and 24(2) of the *Code*.

136 *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

137 For more information on duties and responsibilities in the accommodation process, please see the *Policy and Guidelines on Disability and the Duty to Accommodate*.

138 If waiving the health and safety requirement is likely to result in a violation of the *Occupational Health and Safety Act (OHSA)*, R.S.O. 1990 c. 0-1., the employer should generate alternative measures based on the equivalency clauses of the *OHSA*. The *OHSA* regulations have equivalency clauses that allow for the use of alternative measures to those specified in its regulations, provided the alternative measures afford equal or better protection to workers.

139 Risk is evaluated after all accommodations have been made to reduce it.

140 *Ibid.*

141 Detailed information on the accommodation of persons with disabilities is provided in the *Policy and Guidelines on Disability and the Duty to Accommodate*.

142 The standards of what constitutes undue hardship are discussed in the preceding section.

143 For example, maternity leave or leave due to a disability covered by the *Code*.

144 Section 17 of the *Code*.

145 For more information, refer to the *Policy on Discrimination against Older Persons because of Age*.

146 *Commission scolaire régionale de Chambly v. Bergevin* (1994), 22 C.H.R.R. D/1 (S.C.C.).

147 *Ontario (Ministry of Community and Social Services) v. O.P.S.E.U.* (2000) 50 O.R. (3d) 560 (C.A.)

148 See also the Commission's *Policy on Discrimination Because of Pregnancy and Breastfeeding*.

149 See the discussion of *bona fide* occupational requirements under the section "Designing a Job" for the test that will be applied to determine if the requirement is justified.

150 *Mack v. Marivtsan* (1989), 10 C.H.R.R. D/5892 (Sask. Bd. of Inq.).

151 *Wiens v. Inco Metals Co.* (1988), 9 C.H.R.R. D/4795 (Ont. Bd. of Inq.).

152 *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

153 *Lord v. Haldimand-Norfolk Police Services Board* (1995), 23 C.H.R.R. D/500(Ont. Bd. of Inq.). See also, *Emrick Plastics v. Ontario (Human Rights Commission)* (1992), 16 C.H.R.R. 300 (Ont. Div. Ct.), affirming *Hienke v. Brownell* (1990), 14 C.H.R.R. D/68 (Ont. Bd. of Inq.).

154 For a detailed discussion of pre-employment testing for drugs and alcohol, please see the section "Hiring – Pre-employment Drug and Alcohol Testing". See also the Commission's *Policy on Drug and Alcohol Testing*.

155 *Entrop, supra* note 130.

156 *Ibid.*

157 Subsection 25(1) of the *Code*.

158 Subsection 25(4) of the *Code*.

159 Conversely, in *Ontario Nurses' Association v. Orillia Soldiers' Memorial Hospital* (1999), 42 O.R. (3d) 692 (C.A.) [leave to appeal to S.C.C. refused (December 10, 1999), S.C.C. Bulletin 27176], nurses on unpaid leave of absence due to disability did not accumulate service after periods set out in the collective agreement and the employer was not required to contribute premiums to employee benefit plans after the employees had received long-term disability payments for a specified time. The Ontario Court of Appeal held that there was no contravention of the *Code* because these nurses were not treated differently from those in the comparator group, namely employees who were not working for other reasons.

160 *M. v. H.*, [1999] 2 S.C.R.3.

161 Employment Standards Reg. 286/01, s. 4.

162 *Heidt v. Saskatoon (City)* (1988), 9 C.H.R.R. D/5380 (Sask. Bd. Inq.), affd 10 C.H.R.R. D/5808 (Sask. Q.B.), revd 12 C.H.R.R. D/387 (C.A.), leave to appeal refused 74 D.L.R. (4th) vii (S.C.C.). The Saskatchewan Human Rights Code contained a provision that the prohibition on age discrimination in employment does not prevent the operation of any term of a *bona fide* group or employee insurance plan. The Court of Appeal held that the defence had not been made out as no evidence was led to establish that the discrimination was reasonably necessary to allow the employer to put into place a viable and cost-effective sick plan.

163 *Younger v. Gulf Canada Resources Ltd.* (1988), 10 C.H.R.R. D/6114 (Alta. H.R. Comm.).

164 For example, a Factor 80 retirement scheme.

165 *Ontario Cancer Treatment & Research Foundation v. Ontario (Human Rights Commission)* (1998), 34 C.C.E.L. (2d) 56, 108 O.A.C. 289 (Ont. Div. Ct.); upholding *Crook v. Ontario Cancer Treatment & Research Foundation* (No.3) (1996), 30 C.H.R.R. D/104 (Ont. Bd. Of Inq.).

166 *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.

167 *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167 (Alta. Q.B.); *Parcels v. Red Deer General & Auxiliary Hospital Nursing Home* (Dist. No. 15) (1991), 15 C.H.R.R. D/257 (Alta. Bd. of Inq.).

168 See further *Stagg v. Intercontinental Packers Ltd.* (1992), 18 C.H.R.R. D/392 (Sask. Bd. of Inq.).

169 Subsections 51(1) and 51(2) of the *Employment Standards Act*.

170 Subsection 51(3) of the *Employment Standards Act, 2000.*

171 Sections 45-49 of the *Employment Standards Act, 2000.*

172 Subsection 24(1)(d) of the *Code* provides an exception to this general rule. It allows an employer to give, or refuse to give, employment or a promotion to a person who is a spouse, child or parent of the employer or of an employee. If an employer takes either position, it is preferable to have an articulated written policy that is applied consistently.

173 *Magee v. Warner Lambert Canada* (1990), 12 C.H.R.R. D/208 (B.C.H.R.C.).

174 *Singh v. Canada (Statistics Canada)* (1998), 34 C.H.R.R. D/203 at para. 226 (Can. Trib.)

175 In *Ontari[illegible]rses' Association v. Orillia Soldiers' Memorial Hospital* (1999), 42 O.R. (3d) 692 (C.A.) [leave to appel to S.C.C. refused (December 10, 1999), S.C.C. Bulletin 27176], nurses on unpaid leave of absence due to disability did not accumulate seniority. The Ontario Court of Appeal determined that the treatment of employees with disabilities should be compared to the treatment of all employees and not simply employees absent for other reasons since seniority directly affected the ability of employees to access, remain in, and thrive in the workplace. Since nurses absent due to disability were being treated differently from other employees, there was a contravention of the *Code*.

176 Subsection 51(4) of the *Employment Standards Act, 2000.*

177 See for example, the *Policy on Discrimination against Older Persons because of Age*.

178 *McKee v. Hayes-Dana Inc.* (1992), 17 C.H.R.R. D/79 (Ont. Bd. of Inq.).

179 See for example *Boeing Toronto Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada* (CAW-CLC), Local 673, [2001] C.L.A.D. No. 379 (Labour Arb.).

180 See the discussion of *bona fide* occupational requirements under the section "Designing a Job" for the test that will be applied to determine if the requirement is justified.

181 See "Principles and Concepts - Making the Work place Accessible for Person with Disabilities"; "Terms and Conditions of Employment - Designing a Job"; and "Meeting the Needs of Employees - the Principles of Accommodation" for specific details.

182 See also the Commission's publication *Developing Procedures to Resolve Human Rights Complaints in Your Organization.*

183 See "Terms and Conditions of Employment - Meeting the Needs of Employees - the Principles of Accomodation" for specific details.

184 Subsection 34(1)(d) of the *Code*. Please note that this consideration is subject to an assessment of the complainant's good faith in incurring the delay and any prejudice to the respondents.

185 Subsection 34(1)(a) of the *Code*.

186 Section 8 of the *Code*.

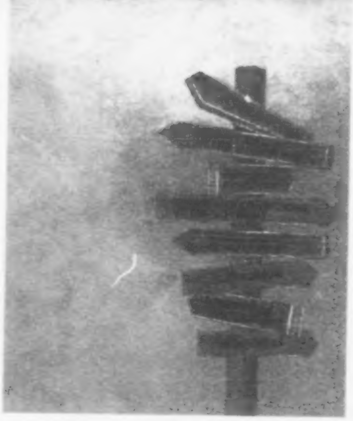
187 *Jones v. Amway of Canada Ltd.*, [2001] O.H.R.B.I.D. No. 9 (Bd. of Inq.), aff'd (2002) 159 O.A.C. 331 (Div. Ct.).

188 Subsection 34(1)(d) of the *Code*.

189 *District of Parry Sound Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 and Ontario Human Rights Commission*, [2003] S.C.J. No. 42; (2003 CLLC 220-062).

190 Section 34 of the *Code*.

INDEX



A

Accommodation
- accessibility review, 32
- alternate work; defined and checklist, 57
- checklist, 11, 35
- cost, 55
- creed/religion, 45, 59
- disability, 45, 50, 56, 57
- drug and alcohol testing, 57, 62, 63
- policy, 72
- principle of accommodation, 52
- employees, 53, 63
- employers, 11, 54
- essential duties, ability to perform, 56
- family status, 61
- harassment, 64
- health and safety risks, 55
- older workers, 58
- personal safety, 56
- phased-in, 53, 55
- pregnancy, 47, 60
- return to work, 57
- rights and duties, 53
- risk to others, 66
- undue hardship, 54
- unions, 28, 41, 53

Age
- definition, 16
- exception to rule of non-discrimination, 37, 44
- job application forms, 41
- job interviews, 44
- mandatory retirement, 16
- on-the-job: accommodating the needs of employees, 58
- scope of protections, 16

Ancestry
- definition, 17
- job application forms, 43
- job interviews, 46
- language and fluency, 36
- scope of protections, 17

Application Forms
- age, 41
- citizenship, place of origin or ethnic origin, 41
- creed/religion, 42
- disability, 42
- family status, 42
- marital status, 43
- race, colour and ancestry, 43
- record of offences, 43
- same-sex partnership status, 43
- sample, 109
- sex and pregnancy, 43
- sexual orientation, 43

B

Benefit Plans
- disabilities, 64
- examples, same-sex benefits, 65
- older workers, 65
- pregnancy and maternity leaves, 65
- same-sex benefits, 65

Building Code, 6

***Bona fide* occupational requirements**
- checklist, 35
- job design, 34
- test for, 35
- non-*bona fide* requirements, 35

C

***Canada Labour Code*,** 5

Canadian *Charter of Human Rights and Freedoms*, 6

***Canadian Human Rights Act*,** 4

Citizenship
- definition, 17
- exceptions to rule of non-discrimination, 7, 37
- job application forms, 41
- job interviews, 44
- scope of protections, 17

Clients/Customers
- liability, 27

Colour
- definition, 22
- job application forms, 43
- job interviews, 46
- scope of protections, 22

Complaints: See Internal Complaints; Ontario Human Rights Commission Complaints

Confidentiality
- harassment, 27
- on-the-job, 51
- practice tips, 52
- transgendered persons, 23

Creed
- break policies, 59
- definition, 17
- dress codes, 59
- exceptions to rule of non-discrimination, 18, 37, 45
- flexible scheduling, 60
- holy days and religious leave, 59
- job application forms, 42
- job interviews, 45
- on the job - accommodating the needs of employees, 59
- scope of protections, 17

D

Disability
- ability to perform essential job duties, 56
- accessible workplace, 31
- accommodating needs of employees, interviews, 45
- alternative work, 57
- definition, 19
- drug and alcohol testing, 49, 62
- employee responsibility, 63
- exception to rule of non-discrimination, 37
- job application forms, 42
- job interviews, 45
- non-evident, 19, 57
- on-the-job, accommodating needs of employees, 56
- return to work, 57
- scope of protections, 19

Discrimination
- adverse effect/constructive, 11
- anti-discrimination policy, 72
- definition, 10
- direct, 10
- indirect, 11
- reprisal, 11

Downsizing, 68

Drug and Alcohol Testing
- accommodation, 63
- alternate programs, 64
- basic principles, 49
- criteria, 63
- on-the-job testing, 50, 62
- pre-employment testing, 49

E

Early retirement, 68

Employees
- contract employees, 29
- contract employees legal responsibilities, 29
- directing mind employees, 26, 27
- legal responsibility, 27
- medical and personal attendants, 30
- scope of protection, 29
- temporary / casual staff, 29
- volunteers, 30

Employers
- directing mind employees, 26, 27
- legal responsibilities, 26
- liability, 12, 27

Employment
- right to equal treatment, 9, 67

Employment Agencies
- legal responsibilities, 28

Employment Standards Act, 4

Ethnic Origin
- definition, 17
- exceptions to rule of non-discrimination, 37, 44
- job application forms, 41
- job interviews, 44
- language and fluency, 36
- scope of protections, 17

Exceptions to Rule of Non-Discrimination
- age, 37, 45
- citizenship, 17, 37
- creed/religion, 18, 45
- ethnic/place of origin, 37, 44
- family status, 20, 46
- nepotism, 20, 46
- sex, 22

F

Family Status
- accommodation, 61
- adverse affect discrimination, 20
- definition, 20
- exceptions to rule of non-discrimination, 20, 46
- job application forms, 42
- job interviews, 46
- scope of protections, 20

Franchisors
- legal responsibilities, 28

G

Gender Identity, 23

Grounds of Discrimination
- age, 16
- ancestry/ethnic origin, 17
- citizenship, 17
- colour, 22
- creed, 17
- disability, 19
- family status, 20
- marital status, 20
- multiple/combined grounds, 25
- place of origin, 21
- pregnancy, 21
- race, 22
- record of offences, 22
- sex, 22
- same-sex partnership status, 24
- sexual orientation, 24

H

Harassment
- accommodation and personal safety, 64
- anti-harassment policy, 72
- definition, 12
- employer's responsibility, 12

poisoned work environment, 14
race, examples, 14
senior manager's responsibility, 12
sexual harassment, 12
sexual orientation, 12
sexual orientation, examples, 15

Hiring
advertising; requirements and checklist, 40
application forms, 41, 109
conditional offer of employment, 36, 43, 45, 47
drug and alcohol testing, 49
employment agencies, 41
interviews, 43
job qualifications, 40
medical tests, 47
psychometric and psychological testing, 48

Housing, 3

Human Rights at Work
accessible workplaces, 31
complaints, 71
conclusion, 80
employee's responsibility, 27
employer's responsibility, 12, 26
employment agencies, 28
franchisor's responsibility, 28
governing legislation, 3
grounds of discrimination, 16
hiring, 40
introduction, 1
job design, 34
manager's responsibility, 27
non-employee's responsibility, 27
on-the-job, 51
publications, 82
resources, 85
right to equal treatment, 9, 67
terms and conditions of employment, 34
union's responsibility, 27
who is protected, 29

I

Internal Complaints Procedures
accommodation policy, 72
advisors, 73
alternate dispute resolution (ADR), 73
checklist, education/training program, 75
collective agreements, 76
content of policies, 72
documentation, 74
education/training programs, 75
investigators, 74
pro-active activities, 71
protection against reprisal, 74
resolution, 75
resolution procedures, 73
rights under Code protected, 73

International Laws, 6

Interviews
age, 44
citizenship, place of origin and ethnic origin, 44
creed/religion, 45
disability, 45
family status, 46
marital status, 46
race, ancestry and colour, 46
record of offences, 46
same-sex partnership status, 47
sex and pregnancy, 46
sexual orientation, 47

J

Job Advancement/Training
equal opportunity, 66, 67
seniority, 67
training, 67

Job Design
accessibility review, 32
bona fide occupational requirements, 34, 35, 36
essential requirements, 36

- inclusive design, 31, 34
- physical demands analysis, 36
- special requirements, 36

Job Disciplinary Action, 68

Job Requirements

- age, 37
- *bona fide* occupational requirements, 34
- citizenship, 37
- creed, 37
- customer preference, 38
- driver's license, 36
- essential requirements, 36
- ethnic origin, 37
- gender specific, 37
- job descriptions, 36
- language and fluency, 36
- marital status, 37
- medical or personal attendant, 38
- not *bona fide* occupational requirements, 35
- physical demands analysis, 36
- race, 37
- record of offences, 22
- same-sex partnership status, 37
- sex, 37
- special interest organizations, 37
- special programs, 38

Job Restructuring, 68

L

Language, 17, 21, 22, 36

Legislation Governing

- *Building Code*, 6
- *Canadian Human Rights Act*, 4
- Canadian *Charter of Rights and Freedoms*, 6
- *Employment Standards Act*, 4
- International law, 6
- Labour Laws, 4
- *Occupational Health and Safety Act*, 5
- *Ontarians With Disabilities Act, 2001*, 5
- Ontario *Human Rights Code* and Regulations, 3, 93, 107
- Privacy Laws, 6
- *Workplace Safety and Insurance Act*, 5

M

Marital Status

- definition, 20
- exception to rule of non-discrimination, 37
- job application forms, 43
- job interviews, 46
- scope of protections, 20

Medical Tests

- checklist, 48
- drug and alcohol testing, 49, 62
- hiring, 47

Mental Illness

- included under definition of disability, 19

O

***Occupational Health and Safety Act*,** 5

Ontario *Human Rights Code*,

- Code and Regs, 93, 107
- grounds in employment, 4
- preamble, 3, 93
- primacy, 3
- social areas, 3

Ontario Human Rights Commission

- education/training assistance, 75
- jurisdiction, 3, 77

Ontario Human Rights Commission Complaints

- discretion not to deal with complaint, 5, 75
- process, 77
- remedies, 78

Ontario *Labour Relations Act*, 4

***Ontarians With Disabilities Act*,** 5

P

Physical Demands Analysis, 36

Place of Origin
- definition, 21
- exception to rule of non-discrimination, 44
- job application forms, 41
- job interviews, 44
- language and fluency, 21, 36
- scope of protections, 21

Poisoned Environment, 14

Pregnancy
- accommodation, 46, 60, 61
- benefit plans, 21, 65
- *bona fide* occupational requirements, 21, 46, 60
- career advancement/development, 66
- defined, 21
- denying or restricting employment opportunities, 21
- health-related absences, 21, 65
- job application forms, 43
- job interviews, 46
- scope of protections, 21
- seniority, 67
- termination, 67

Privacy Laws, 6

Psychometric and Psychological Testing, 48

R

Race
- definition, 22
- harassment, examples, 14
- job application forms, 43
- job interviews, 46
- language and fluency, 22
- scope of protections, 22

Record of Offences
- definition, 22
- job application forms, 43
- job interviews, 46
- scope of protection, 22

Religion
- break policies, 59
- definition, 17
- dress codes, 59
- exceptions to rule of non-discrimination, 18, 37, 45
- flexible scheduling, 60
- holy days and religious leave, 59
- job application forms, 42
- job interviews, 45
- on the job - accommodating needs of employees, 59
- scope of protections, 17

Reprisal
- discrimination, 11
- sexual solicitation, 13

Resources
- community and professional organizations, 85
- government organizations, 87
- government publications, 91
- Ontario Human Rights Commission Publications, 82
- other publications, 83
- workplace accommodation, disability, 89
- workplace accommodation, creed/religion, 89

S

Same-sex Partnership
- definition, 24
- exception to rule of non-discrimination, 37
- harassment, examples, 15

job application forms, 43
job interviews, 47
same-sex benefits, 64
scope of protection, 24

Senior Managers
liability, 27

Seniority
disability, 67
pregnancy, 67

Sex
definition, 22
exceptions to rule of non-discrimination, 22, 23, 37
gender identity, 23
job application forms, 43
job interviews, 46
scope of protection, 22, 23
transgendered persons, 23

Sexual Harassment
definition, 12
examples, 13

Sexual Orientation
definition, 24
harassment, examples, 15
job application forms, 43
job interviews, 47
scope of protection, 24

Sexual Solicitation
definition, 13
reprisal, 14

Special Interest Organizations, 18, 22, 37

Special Programs
defined, 38
eligibility criteria, 38
follow a plan, 39
rational for program, 38

T

Temporary/Casual Staff, 29

Training
equal opportunity, 67
employer programs, 75

Transgendered persons, 23

U

Undue Hardship
accommodating employee needs, 54
constructive discrimination, 11
cost, 55
health and safety risks, 55

Unions
duty to accommodate, 28, 53, 54
legal responsibilities, 27, 28, 76
liability, 27, 28

Universal Declaration of Human Rights, 3, 22

V

Volunteers, 30

W

Workplace Safety and Insurance Act, 5, 19

HRPAO
Human Resources
Professionals
Association of Ontario

Ontario
Human Rights
Commission

Commission
ontarienne des
droits de la personne

Ontario

$34.95